Lindley, Albert Lowell.

700 W. 28th St.

Los Angeles Calif.

SELECTED CASES

ON THE

LAW OF TAXATION

EDITED BY

FRANK J. GOODNOW
EATON PROFESSOR OF ADMINISTRATIVE LAW IN COLUMBIA UNIVERSITY

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PREFACE

The editor has in this book attempted to collect cases which will illustrate the fundamental principles of the law governing the assessment and collection of taxes. As the law upon this subject is to so high a degree the result of the action of legislative bodies, and is in a continual state of change, it has been deemed inexpedient to endeavor to set forth the positive law of any particular state. One of the necessary consequences of this method of treatment has been the inclusion of a comparatively large number of cases involving constitutional questions. Constitutional questions in taxation are, however, of such supreme importance in this country that it has been thought that the great amount of space devoted to them will add to rather than detract from the value of the book.

As this collection of cases has been made with the needs of the student of the subject primarily in view, it has been deemed advisable to follow, in the order in which the cases chosen have been arranged, the presentation of the law to be found in the standard text on the subject, *viz.*, "A Treatise on the Law of Taxation etc." by the late Judge Cooley. The adoption of this method of arrangement has involved a treatment of the subject based on the most important operations necessary for the assessment and collection of the taxes rather than upon the different kinds of taxes. The index by which the cases are accompanied will, however, refer the enquirer to the cases treating of the particular kind of tax as to which he desires information, and the attempt has been made to select cases which treat to some degree at least of almost every kind of tax which it is customary for either the federal government or that of the states, or any of their local organizations to levy.

Although no attempt has been made to accompany the cases selected by exhaustive notes, brief annotations have been appended to the cases where the editor has deemed it necessary.

Finally, it is to be noted that portions of the statements of facts and of the opinions have been omitted wherever such omission has been felt to be either necessary to confine the application of the case to the point of law sought to be illustrated, or to be possible with due regard to the desire to have the case comprehensible to the student.

Frank J. Goodnow.

Columbia University, August, 1905.

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CASES ON TAXATION

CHAPTER I.

THE NATURE OF TAXES.

I. Taxes Not Debts.

PEIRCE v. CITY OF BOSTON.

Supreme Judicial Court of Massachusetts. March, 1842.
3 Metcalf 520.

Hubbard, J. This is an action of assumpsit, brought to recover a sum of money due to the plaintiff for his services as a teacher in one of the public schools in the city.

The right of the plaintiff to a judgment in his favor is resisted, on the ground that his demand, before the commencement of the suit, was assigned to Joel Peirce, and by him to George Odin, for whose benefit the action is brought; and as against George Odin, and in like manner as if he were the plaintiff in the suit, the defendants claim to set off certain taxes assessed upon the said George Odin and Reuben Richards, as assignees of John Odin, by the proper authorities of the city; which taxes were unpaid at the time when the services were rendered by the plaintiff, and still remain unpaid.

The question submitted to the court for its decision is, whether such set-off can legally be made. It is contended by the defendants, that these are mutual demands between the parties, and that, by force of the Rev. Sts. c. 96, the one demand may be set off against the other, and judgment be given for the balance. Two objections are made to such an allowance; the one, that the demand of the defendants is not of the nature contemplated by the statute; and the other, the want of mutuality in the parties.

The right to set off mutual debts has long been recognized; but while the principle has been acknowledged, the application of it has been restrained within circumscribed limits. The St. of 1784, c. 28, § 12, provided that in actions brought to recover the amount of an account, or for services rendered, the defendant might file any account he had against the plaintiff, by way of set-off to the plain-

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tiff's demand. By St. 1793, c. 75, § 4, the remedy was extended, so that in actions brought for any debt upon simple contract or promise in writing not under seal, defendants might file in set-off any demands against plaintiffs for goods delivered, moneys paid, or services done. By the Rev. Sts. c. 96, this right is greatly extended, and not only accounts and claims for services, or for goods delivered, may now be set off, but also demands founded on judgments and on contracts express or implied, and with or without seal. But notwithstanding this enlargement, the counsel for the plaintiff contends that taxes, assessed upon a citizen, are neither demands founded upon a judgment, nor contracts between parties. To which it has been ingeniously replied by the learned counsel for the city, that the assessment of taxes is a judgment, and the warrant to collect them an execution founded upon such judgment; and if not technically a judgment at the common law, yet that it is substantially a judgment, within the intent and meaning of the statute. But we are of opinion, that this position cannot be successfully maintained; for though the right of set-off is enlarged, the language of the statute is still precise and definite. "No demand shall be set off, unless it is founded upon a judgment or upon a contract; but the contract may be either express or implied, and with or without a seal." Rev. Sts. c. 96, § 2.

Judgments are the judicial sentences of courts, rendered in causes within their jurisdiction, and coming legally before them, and are conclusive in all cases where no appeal or writ of error lies, and cannot be inquired into or controverted.

Taxes are those proportional and reasonable assessments and duties which may, by virtue of the constitution, be imposed from time to time, by the General Court, upon the inhabitants of the Commonwealth, for the necessary defense and support of the government, and for the protection and preservation of the rights, and to promote the interests, of the people. They do not partake of the nature of judgments. The imposition and collection of them are ministerial acts, and are the proper subjects of inquiry, as to the manner of their assessment and the mode of their enforcement, in the judicial forum; and for the collection of them no right of action is given (with a few special exceptions, growing out of the death of parties, or their removal out of the collector's precinct, or on the marriage of females), nor can they be turned into judgments. Nor are taxes contracts between party and party, either express or implied; but they are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making or enforcing

of which their personal consent, individually, is not required. With this view of the statute, we are of the opinion, that the defendants' claim is not one which can be set off under any of its provisions. . . . . . .

Conformably to the agreement of the parties, an assessor will be appointed to ascertain the amount due from the city, unless the parties agree upon the same.

Perry vs Walbon 20 vol 318.

SHAW V. PECKETT ET AL.

Supreme Court of Vermont. March, 1854. 26 Vermont 482.

Trespass for false imprisonment. The defendants filed a special plea, justifying under a tax-bill and warrant. The plaintiff replied and set forth in his replication, that at the time he was arrested in August, 1851, he handed to the defendant, Gerry, the sum of $13.25, which was the amount of the tax and costs charged by said defendant, and asked to be discharged; but, that said defendant refused to discharge the plaintiff from arrest, and for a long time kept the plaintiff under arrest and imprisoned; the said defendant refusing to set the plaintiff at liberty until he paid the sum of $3.44, claimed by said defendant to be due as interest on the said taxes. The defendants rejoined and set forth, in substance, that the defendant, Gerry, having the tax-bills and warrants, on the first day of June, 1846, demanded the said several sums in said tax-bills due against said Shaw, of him, the said Shaw; that he refused and ever since has refused and neglected to pay, until the 7th day of August, 1851, when said Shaw, having come within the state of Vermont, and having no goods or chattels whereon to make distress, he took the body of the said Shaw, calling to his aid the said Peckett, and held said Shaw about ten hours, until he paid said taxes, costs and said sum of $3.44, interest, accruing from the time of said demand to the time of said payment, all of which was lawful, &c.

To the rejoinder of the defendants, the plaintiff demurred.

The County Court, January Term, 1854—Collamer, J., presiding—rendered judgment that the rejoinder is sufficient, and that defendants recover their costs.

Exceptions by plaintiff.

The opinion of the court was delivered by

Isham, J. The judgment of the county court in this case must be reversed. The arrest of which the plaintiff complains, is ad-

mitted by defendant, Gerry, in this plea, but he justifies the same as collector of taxes. From the facts which are admitted by the demurrer, it appears that the plaintiff was assessed, in the sum of $11.96, as specified in two several rate-bills and warrants, which were issued and placed in the defendant's hands, as collector; and that for the non-payment of these two taxes the arrest was made.

The legality of the assessments, rate-bills, and warrants, are not disputed, but it is insisted that the arrest was illegal, as the plaintiff handed to defendant, Gerry, the sum of $13.25, being the amount of the taxes and costs, and requested to be discharged, which said defendant refused to do, until the further sum of $3.44 was paid as interest on the taxes. The defendant states as a ground for the recovery of the interest, that he made a demand for the payment of the taxes, on the first day of June, 1846, and that the plaintiff neglected and refused to pay them, until the time of the arrest in August, 1851. The demurrer admits that the arrest was made for the purpose of enforcing the payment of interest merely. The question arises, whether for that purpose, the arrest and commitment was legal.

We are satisfied that the collector had no right to demand and enforce the payment of that interest. The taxes were assessed in 1846, and have remained in the hands of the collector until their payment in 1851. The plaintiff was absent from the state during all the period from the time of the assessment, to the time of the arrest, and had no property in this state, known to the collector, which could be distrained. There is no provision of the statute authorizing him to collect interest on taxes, of the persons against whom they are assessed, and we perceive no provision which subjects the collector to the payment of interest under such circumstances. The assessment of taxes does not create a debt that can be enforced by suit, or upon which a promise to pay interest can be implied. It is a proceeding purely *in invitum*. The existence of a contract, either express or implied, is the ground upon which interest is generally allowed. . . . . . .

The justification is deemed insufficient, and the judgment of the county court must be reversed and the case remanded.

II. Suits for Collection.

CITY OF CAMDEN V. HENRY ALLEN ET AL.

Supreme Court of New Jersey. November, 1857.
2 Dutcher 398.

The Chief Justice. An action of debt was brought by the plaintiff, in the Camden circuit, for the recovery of taxes assessed by authority of the city of Camden, upon real estate in that city, in the year 1853. Upon a general demurrer to the declaration, the case is certified to this court for its advisory opinion.

The only question presented by counsel, upon the case certified for the opinion of this court, is whether an action of debt will lie to recover taxes under the laws of this state. It is not denied that the city had power to levy the tax in question, and that the assessment was regularly made. The payment of the tax may, it is conceded, be enforced in the mode prescribed by the statute but may resort be had to an action at law to enforce payment?

A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state. It is not founded on contract or agreement. It operates in *invitum*. *Peirce* v. *The City of Boston,* 3 Metc. 520. A debt is a sum of money due by certain and express agreement. It originates in, and is founded upon contract express or implied.

A debt universally bears interest from the time it is due. A tax never carries interest. No instance, it is believed, can be found since the formation of the government where a claim for interest on taxes has been made or enforced.

In *Shaw* v. *Peckett,* 26 Verm. 482, it was expressly decided that interest could not be collected upon a tax, and that it could not be enforced by suit.

Debt is the subject matter of set-off, and is liable to set-off; a tax is neither. To hold that a tax is liable to set-off would be utterly subversive of the power of government and destructive of the very end of taxation. If the national debt of Great Britain were distributed among one-half or three-fourths of its taxpayers, could they set off such debt, if past maturity, against the annual tax assessed against them for the support of government? Or can the multitude of creditors of our local municipal corporations set-

off the debts due from the town or city against their taxes? The question relates not to the technical form of making the set-off; but, as a matter of principle and sound policy, could the claim be tolerated? How is government to be maintained upon such theory? It is not improbable that at this hour many of our municipal corporations are indebted to their own citizens, in amounts far exceeding the annual tax which, by their charters, they are authorized to levy. If a principle so clear requires an authority in its support, it will be found in *Peirce* v. *The City of Boston,* 3 Metc. 520.

It was also held, in the case just cited, that taxes do not partake of the nature of judgments; that no right of action is given for them, except in certain specified cases, and that they cannot be turned into judgments.

There is in fact no necessity, nor reason, nor ground of policy, for converting a tax into a debt, and bringing an action for its recovery. The government and municipal corporations exercising the functions of government have a higher and better remedy. It is a claim created by government, through the action of its own executive officers, having all the efficacy of a judgment, creating a lien upon property, admitting of no appeal, except to its own specially constituted agents, nor under the control of judicial tribunals, subject to none of the delays incident to proceedings in courts of law, and capable of being enforced by process more summary than legal execution. On the other hand, to permit municipal corporations, or their subordinate officers, at pleasure to forego the plain and simple method prescribed by statute for the recovery of taxes, and to subject the taxpayer to the vexation and costs of legal proceedings, would be adding a wanton and intolerable grievance to a burthen already sufficently onerous.

If, indeed, a tax should be imposed, and no method be provided by law for its recovery, a resort to legal proceedings would then be a matter of necessity. By the fundamental principle of the law, there must be a redress for every wrong, a method of recovery for every due. In the cases cited upon the argument, where an action of debt was maintained, in Ohio for the recovery of tax, the only points discussed or decided relate to the legality of the tax itself. No question appears to have been raised as to the form of recovery. *Ohio* v. *Hibbard,* 3 Ohio R. 63; *Ohio* v. *Gazlay,* 5 Ohio R. 14. It may be presumed that the statute of that state either prescribed no other mode of recovery, or expressly authorized the bringing of the action. In my opinion, the declaration contains no cause of action.

The circuit court should be advised that the defendant is entitled to judgment upon the demurrer.

MEREDITH ET AL. V. THE UNITED STATES.

Supreme Court of the United States. January, 1839.
13 Peters 486.

Mr. Justice Story delivered the opinion of the Court.

This is a writ of error to the Circuit Court for the District of Maryland. The original action was assumpsit, brought by the United States against the plaintiffs in error, who were the original defendants, to recover from them, as assignees under a general assignment of the property of the firm of Smith and Buchanan, the amount of certain duties alleged to be due from the said firm upon certain importations in the brig Unicorn and the ship Brazilian, out of the funds in the hands of the assignees, upon the ground of an asserted right of priority of the United States to payment out of the same funds.

At the trial, upon the general issue, the material facts appeared as follows. In the years 1818 and 1819 Smith and Buchanan, and Hollins and M'Blair, two separate commercial firms in Baltimore, imported, on their own account as owners, a quantity of goods from Calcutta in the brig Unicorn and ship Brazilian above mentioned, on which the present duties were claimed. Smith and Buchanan were the importers and owners of two-thirds of the cargo of the ship, and five-ninths of that of the brig; and that proportion went to their possession and use. The remainder of both cargoes belonged to Hollins and M'Blair. The entries of both cargoes were made at the customhouse at Baltimore by John S. Hollins, one of the firm of Hollins and M'Blair, as imported in the vessels, respectively, by Hollins and M'Blair and Smith and Buchanan; and Hollins gave bonds for the duties in the common form in his own name; and James A. Buchanan of the firm of Smith and Buchanan, and Lemuel Taylor, who is admitted to be a mere surety, also executed the same bonds. The condition of the bonds was for the payment of the duties on the goods "entered by the above bounden John S. Hollins, for Smith and Buchanan, and Hollins and M'Blair, as imported" in the ship and brig respectively. Upon these bonds the United States after-

ward instituted actions against each of the obligors, and recovered judgments in the Circuit Court for the District of Maryland. These judgments have been revived and are now in full force and unreversed. Smith and Buchanan became insolvent; and after the rendition of the judgments, Taylor also became insolvent under the insolvent laws of Maryland.

. . . .

The first question is, whether Smith and Buchanan were ever personally indebted for these duties; or, in other words, whether the importers of goods do, in virtue of the importation thereof, become personally indebted to the United States for the duties due thereon; or the remedy of the United States is exclusively confined to the lien on the goods, and the security of the bond given for the duties. It appears to us clear upon principle, as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer (and the consignee for this purpose is treated as the owner and importer,) independently of any lien on the goods, and any bond given for the duties. The language of the duty act of the 27th of April, 1816, ch. 107, under which the present importations were made, declares that "there shall be levied, collected and paid," the several duties prescribed by the act on goods imported into the United States. And this is a common formulary in other acts laying duties. Now, in the exposition of statutes laying duties, it has been a common rule of interpretation derived from the principles of the common law, that where the duty is charged on the goods, the meaning is that it is a personal charge on the owner by reason of the goods. So it was held in *Attorney General* v. ———, 2 Anst. R. 558, where a duty was laid on wash in a still; and it was said by the Court that where duties are charged on any articles in a revenue act, the word "charged" means that the owner shall be debited with the sum; and that this rule prevailed even when the article was actually lost or destroyed before it became available to the owner. Nor is there anything new in this doctrine; for it has long been held that in all such cases an action of debt lies in favor of the government against the importer, for the duties, whenever by accident, mistake, or fraud, no duties, or short duties have been paid.

. . . .

Upon the whole we are of opinion that the judgment of the Circuit Court ought to be affirmed. . . . . .

Suits for the collection of taxes are very frequently found in the books. They are allowed either as result of the application of the principle applied in the principal case or because specially permitted by statute. Cases in this collection where such suits have been allowed are: Boreland v. Boston, 132 Mass., 89; City of Burlington v. Putnam Ins. Co., 31 Iowa, 102; County of Santa Clara v. Southern Pac. R. R. Co., 18 Fed. Rep., 385; Hammett v. Philadelphia, 65 Pa. St., 146; Home Ins. Co. v. New York, 134 N. S., 594; Partridge v. Lucas, 99 Cal., 519; Pennsylvania v. Rancuel, 21 Howard (U. S.), 104; People v. Equitable Trust Co., 96 N. Y., 387; People v. Horn Silver Mining Co., 105 N. Y., 76; Philadelphia v. Pennsylvania Hospital, 143 Pa. St., 367; State v. Central Pacific R. R. Co., 7 Nevada, 99; United States v. B. & O. R. R. Co., 17 Wallace, 322; W. U. Tel. Co. v. Borough of New Hope, 187 U. S., 419; Woodruff v. Parham, 8 Wallace, 123.

CHAPTER II.

THE NATURE OF THE POWER TO TAX.

I. The Taxing Power a Legislative Power.

PEOPLE V. COLEMAN ET AL.

PEOPLE V. HUSSEY ET AL.

Supreme Court of California. January, 1854.
4 California 46.

The complaints in these several cases, against the several defendants therein, and doing business in the city of San Francisco, by designation of the Attorney General, in order to secure an impartial trial, were filed in Contra Costa County, in the ordinary form, to recover the penalties imposed by Article VI. of the Revenue Act of May 18, 1853, on auctioneers, for selling real or personal property without a license. . . . . .

The defendants demurred to the several complaints, and assigned for error, that the whole revenue act of 1853, and particularly articles VI. and VII., were in direct conflict with the Constitutions of the State of California and of the United States, and, therefore, null and void. A decision, *pro forma,* was entered by the court, sustaining the demurrer from which decision appears were prosecuted in this court.

Mr. Ch. J. Murray delivered the opinion of the court. Mr. J. Heydenfeldt concurred.

This appeal is prosecuted from a *pro forma* decision of the District Court of Contra Costa County.

The suit was commenced in the nature of a prosecution, to recover the penalty for a violation of the revenue act of 1853.

The defendants demur on the ground that the act in question is repugnant to the Constitution of the United States, and the Constitution of the State of California.

. . . .

To enable us to arrive at a correct determination of this case, it may well to lay down, *in limine,* a few principles, which, we believe, by lono acceptation, have become universally recognized as truisms, and which have not, within our knowledge, been doubted, except, perhaps, by the learned counsel for the respondents.

1st. That each State is supreme within its own sphere, as an independent sovereignty.

2d. That the Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden bv the Constitution of the State, or delegated to the General Government, or prohibited by the Constitution of the United States.

From this it follows that the power of the Legislature to tax trades, professions, and occupations, is a matter completely within the control, and, unless inhibited by the Constitution, eminently belonging to, and resting in, the sound discretion of the Legislature. This principle has been repeatedly maintained by the Courts of almost every State in the Union, and reiterated by the decisions of the Supreme Court of the United States.

It becomes necessary, then to inquire if this power has been withdrawn by our Constitution, from the Legislature.

This position seems to have been abandoned, upon the argument of the case. In fact, so strong are the authorities and obvious the rules of construction, that it would be almost insulting the intelligence of any respectable tribunal to contend for it.

But it is contended that, conceding this power to tax occupations and professions, it has been limited by the 13th section of the 11th article of the Constitution, which provides that "Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law; but Assessors and Collectors of town, county and State taxes shall be elected by the qualified electors of the district, county or town in which the property taxed for State, county or town purposes is situated."

Do the words, "shall be equal and uniform," operate as a limitation upon the taxing power of the Legislature, and apply to every species of taxation to which Government may resort for the maintenance of itself, or are they to be taken as applying only to direct taxation upon property, as such, and intended to prevent the Legislature from fixing an arbitrary standard as to kind or quality, by providing that it shall be taxed in proportion to its value, to be ascertained as provided by law?

. . . .

We are of opinion, that the words "equal and uniform" apply only to a direct tax on property; that the Legislature may select or exempt such property as, in its discretion, it may think proper; and

that these words do not, by any fair rule of interpretation, extend to taxes on occupation.

But it is contended that the Act of May, 1853, violates that provision of our Constitution which provides that "all laws of a general nature shall be uniform in their operation."

Much of the reasoning upon the first branch of this case is applicable to this point. By a "uniform operation" it was intended that laws of this character should, as near as possible, affect persons and property alike. No legislation has ever yet produced a law taxing the subject for support of Government, which really accomplished this object; from the very nature of the subject it is impossible. The citizen who is protected in $100,000 worth of improved property in the City of San Francisco, paying an income from 15 to 30 per cent per annum, pays no more State tax upon the same, than the one who lives in a remote portion of the State, owning the same amount of property in wild and unproductive lands.

The burdens of Government cannot fall equally upon all; the condition, estate, and occupation of the individual must vary the operation of the law in almost every case.

The idea of a revenue law which is equal in its operation is entirely Utopian, and never can be realized. If the Legislature should pass an act designedly operating unequally; or if a want of uniformity in its operation was apparent upon its face, it would be the duty of this Court to interpose, and prevent the commission of so grave an injustice.

But if, in trying to approximate a correct standard, the law may work a hardship in particular supposed cases, it would rather be a consideration for the Legislature, than an argument for the Courts.

. . . .

We have carefully examined all the arguments of the respondents, and are irresistibly impelled to the conclusion, that the Act of May, 1853, is neither in derogation of the Constitution of this State or the Constitution of the United States.

This opinion is based, as we believe, on no new principles, and in announcing it, we but reiterate the decisions of the tribunals of other States.

Without any precedents, however, to control us, looking alone to the powers of a sovereign State, and its absolute control over persons and property within its own jurisdiction, as well as to the ruinous consequences which would ensue from a different decision,

we are fully of the opinion that the taxing power rests alone in the sound discretion of the Legislature, subject to the restrictions we have already laid down.

Without it, in cases of emergency or extraordinary necessity, State sovereignty and State power would be a baseless and visionary phantom, unable alike to maintain its own domestic independence and dignity, or to defend itself against the assaults of federal encroachment.

Judgment affirmed.

A petition for a rehearing was filed by respondents, but refused by the Court.

PEOPLE EX REL. GRIFFIN V. MAYOR, ETC., OF BROOKLYN.

Court of Appeals of New York, April, 1851.
4 New York 419.

Under the charter of the city of Brooklyn, the common council in the year 1848 caused Flushing avenue, one of the streets of that city, to be graded and paved at an expense of $20,390.25, which, according to a provision in the charter, was assessed upon the owners or occupants of the lands benefitted by the improvement, in proportion to the amount of such benefit. After the assessment had been confirmed by the common council, Griffin and others, the relators, caused the proceedings to be removed by certiorari into the supreme court, where the proceedings were reversed and the assessment annulled, on the ground that the statute authorizing such assessments was unconstitutional and void. The mayor and common council appealed to this court.

Ruggles, J. . . . The grading and paving of the avenue was done under a contract made with the common council; and the city having paid, or being liable for the amount, the assessment was made to reimburse the treasury, or to supply it with the means of payment.

The Supreme Court reversed and annulled the assessment, holding,

First. That the assessment was not a lawful exercise of the power of taxation.

Secondly. That money is property; that it cannot be taken from a citizen for public use by the right of eminent domain, without just compensation; and that the enhancement in value of

the relator's lands, by the grading and paving of Flushing avenue, is not that just compensation within the meaning of the constitution.

Thirdly. That the money not being taken by the just exercise of either of these powers, is taken, or exacted, without due process of law, and therefore in violation of the 6th section of the first article of the constitution, and the assessment is void. The case has been heard and is now to be decided on appeal.

Private property may be constitutionally taken for public use in two modes; that is to say, by *taxation* and by right of *eminent domain.* These are rights which the people collectively retain over the property of individuals, to resume such portions of it as may be necessary for public use.

The right of taxation and the right of eminent domain rest substantially on the same foundation. Compensation is made when private propertv is taken in either way. Money is property. Taxation takes it for public use; and the tax-payer receives, or is supposed to receive his just compensation in the protection which Government affords to his life, liberty and property, and in the increase of the value of his possessions by the use to which the Government applies the money raised by the tax. When private property is taken by right of eminent domain, special compensation is made, for the reason hereafter stated.

For the purpose of determining the constitutional question raised on the argument of this case, the first inquiry will be whether the street assessment in question was a rightful exercise of the power of taxation.

. . . .

It is conceded that the grading and paving of Flushing avenue was a public work, the expense of which might rightfully have been raised by general taxation upon all the taxable inhabitants of Brooklyn. The legislature thought proper to shift the burthen of this taxation upon that part, or class, of the taxable inhabitants exclusively, whose lands were benefitted by the work, and to impose it on them in proportion to the benefit they respectively received therefrom.

This change in the apportionment of the burthen was obviously made for the purpose of avoiding the injustice of general taxation for a special local object, the benefit of which extended only to a portion of the inhabitants of the city. It professed to apportion the tax according to the maxim, that "he who receives the advantage ought to sustain the burthen," and to exact from each of the parties assessed no more than his just share of the burthen accord-

ing to this equitable rule of apportionment. The assessment, therefore, was taxation, and not an attempt to exercise the right of emi nent domain.

If there be any sound objection to the assessment as a tax, it must be an objection which applies to the principle on which the tax is apportioned; because the object for which the money was to be raised is, without dispute, one for which taxation by a different rule of apportionment would have been lawful.

It remains to be seen whether anything can be found in the Constitution; in legal adjudication; in the practice of the Government, or in the nature of things, by which taxation upon this principle of apportionment can be judicially annulled.

For the purpose of ascertaining what has been deemed, on high authority, the nature and extent of the power of taxation vested in the legislatures of the State Governments, I refer to the opinion of the late Chief Justice Marshall, in the case of *Providence Bank* v. *Billings* (4 Peters 514, 561, 563).

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the government as part of itself, and need not be reserved where property of any description or the right to use it in any manner is granted to individuals or to corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burthens; *and that portion must be determined by the legislature.* This vital power may be abused, but the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation." . . . . . .

Assuming this, as we safely may, to be sound doctrine, it must be conceded that the power of taxation and of apportioning taxation, or of assigning to each individual his share of the burthen, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment; and the power of apportionment is, therefore, unlimited, unless it be restrained as a part of the power of taxation.

There is not, and since the original organization of the state government there has not been any such constitutional limitation

or restraint. The people have never ordained that taxation must be limited or regulated by any or either of the rules laid down by the supreme court in the case of *The People* v. *The Mayor of Brooklyn* (6 Barb. 209), or in the case now under consideration. They have not ordained that taxation shall be general, so as to embrace all persons or all taxable persons within the state, or within any district, or territorial division of the state; nor that it shall or shall not be numerically equal, as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax "must be co-extensive with the district, or upon all the property in a district which has the character of and is known to the law as a local sovereignty." Nor have they ordained or forbidden that a tax shall be apportioned according to the benefit which each tax-payer is supposed to receive from the object on which the tax is expended. In all these particulars the power of taxation is unrestrained.

The application of any one of these rules or principles of apportionment, to all cases, would be manifestly oppressive and unjust. Either may be rightly and wisely applied to the particular exigency to which it is best adapted.

Taxation is sometimes regulated by one of these principles, and sometimes by another; and very often it has been apportioned without reference to locality or to the tax-payer's ability to contribute, or to any proportion between the burthen and the benefit. The excise laws and taxes on carriages and watches are among the many examples of this description of taxation. Some taxes affect classes of inhabitants only. All duties on imported goods are taxes on the class of consumers. The tax on one imported article falls on a large class of consumers, while the tax on another affects comparatively a few individuals. The duty on one article consumed by one class of inhabitants is twenty per cent of its value; while on another, consumed by a different class, it is forty per cent. The duty on one foreign commodity is laid for the purpose of revenue mainly, without reference to the ability of its consumers to pay; as in the case of the duty on salt. The duty on another is laid for the purpose of encouraging domestic manufacturers of the same article; thus compelling the consumer to pay a higher price to one man than he could otherwise have bought the article for from another. These discriminations may be impolitic, and in some cases unjust; but if the power of taxation upon importations had not been transferred by the people of this state to the federal gov-

ernment, there could have been no pretence for declaring them to be unconstitutional in state legislation.

A property tax for the general purposes of the government, either of the state at large or of a county, city or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burthen according to the benefit more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation, in the protection and improvement of his property, than a poor man, and ought therefore to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty; and for that reason a property tax is adopted instead of an estimate of benefits. In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe rules on which taxation is to be apportioned; and whose determination of this matter, being within the scope of its lawful power, is conclusive.

In the case of *The People* v. *Brooklyn,* before referred to, it was said that a tax to be valid must be apportioned "upon principles of just equality," and upon all the property in the same political district; and that this is a fundamental principle of free government, which, although not contained in the constitution, limits and controls the power of the legislature. This is new and it seems to me to be dangerous doctrine. It clothes the judicial tribunals with the power of trying the validity of a tax by a test neither described nor defined by the constitution. If by this test we may condemn an assessment apportioned according to the relation between burthen and benefit, we may with far better reason condemn a capitation tax on the ground that numerical equality is not just equality; or a general property tax for a local object, because it compels one portion of the community to pay more than their just share for the benefit of another portion. All discriminations in the taxation of property, and all exemptions from taxation on grounds of public policy, would fall by the application of this test. If this doctrine prevails it places the power of the courts above that of the legislature in a matter affecting not only the vital interests, but the very existence of the government. It assumes that the apportionment of taxation is to be regulated by judicial and not by legislative discretion. It obstructs the exercise of powers which belong to and are inherent in the legislative department,

and restrains the action in that branch of the government in cases in which the constitution has left it free to act.

. . . .

There never was any just foundation for saying that local taxation must necessarily be limited by or co-extensive with any previously established district. It is wrong that a few should be taxed for the benefit of the whole; and it is equally wrong that the whole should be taxed for the benefit of a few. No one town ought to be taxed exclusively for the payment of county expenses; and no county should be taxed for the expenses incurred for the benefit of a single town. The same principle of justice requires that where taxation for any local object benefits only a portion of a city or town, that portion only should bear the burthen. There being no constitutional prohibition, the legislature may create a district for that special purpose, or they may tax a class of lands or persons benefitted, to be designated by the public agents appointed for that purpose, without reference to town, county or district lines. General taxation for such local objects is manifestly unjust. It burthens those who are not benefitted, and benefits those who are not burthened. This injustice has led to the substitution of street assessments in place of general taxation; and it seems to be impossible to deny that in the theory of their apportionment they are far more equitable than general taxation for the purpose they are designed for. . . . . .

It has been said that the benefits to be derived from the grading and paving of a street are sometimes fanciful and imaginary, and always uncertain and incapable of being estimated with that exactness which is necessary for the purposes of justice to the individuals assessed. But this is a consideration to be addressed to the legislature, and not to the judicial authorities. The courts cannot assume that this proposition is true in point of fact. The legislature has evidently acted on the belief that it is untrue. That mistakes may have happened, that abuses may have been practiced, and that injustice may have been done in making street assessments it is not necessary to deny. Mistakes, abuses and injustice have often occurred in general taxation. These are not grounds on which either system of supplying the public treasury can be denounced as unconstitutional. If the systems are imperfect they should be reformed by the legislature. If street assessments are in their practical operation oppressive and unjust, the statutes which authorize them should be repealed. The remedy for unjust or unwise legislation is not to be administered by the courts. It remains in the

hands of the people, and is to be wrought out by means of a change in the representative body if it cannot be otherwise obtained. The constitution has imposed upon the legislature the duty of restraining the power of municipal corporations in making assessments, and of preventing abuses therein. (Art. 8, sec. 9.) To assume that this duty has been and will be neglected, is a denial of that reasonable confidence which one part of the government ought always to entertain towards the others. The danger of abuse which is supposed to exist in the making of street assessments exists in a greater or less degree, in every conceivable system of taxation, according to value; and if the courts have authority to annul an assessment on this ground, they have the like authority to annul any other tax assessed upon valuation, on the same ground. It need not be said that this would be a much more alarming power than the unlimited right of taxation intrusted by the people to their representatives. . . . . .

This system of taxation was in force at the time of the making and adoption of our first, second and third constitutions, and has stood in our statute books along with the constitutions, from 1777 until now, without prohibition or restraint. Sales of real estate to large amounts have been made, and the lands so sold are now held on the faith of the validity of these assessment laws. Proceedings under them have been brought before the supreme court for review continually during the last thirty years. They have been litigated often on the ground of irregularity, and sometimes upon constitutional objections. They have been confirmed in cases almost without number. If the uniform practice of the government, from its origin, can settle any question of this nature, the power of the legislature to exercise this kind of taxation would seem to be established by it.

. . . .

The judgment of the supreme court should be reversed, and the assessments affirmed.

Ordered accordingly.

As to the power of the courts in some states to control the discretion of the legislature in determining the question of benefit in the case of special assessments see Hammett v. Philadelphia 65 Pa. St. 146; State v. Newark, 3 Dutcher (N. J. L.) 186. *Infra.*

VEAZIE BANK V. FENNO.

Supreme Court of the United States. December, 1869.
8 Wallace, 533.

On certificate of division for the Circuit Court for Maine.

Congress passed, July 13, 1866, an act the second clause of the 9th section of which enacts (14 Stat. at Large 146):

"That every National banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of notes of any person, state bank, or state banking association, used for circulation and paid out by them after the 1st day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue."

Under this act a tax of ten per cent was asseseed upon the Veazie Bank, for its bank notes issued for circulation after the day named in the act.

The Veazie Bank was a corporation chartered by the state of Maine, with the authority to issue bank notes for circulation, and the notes upon which the tax imposed by the act was collected were issued under this authority. There was nothing in the case showing that the bank sustained any relation to the State as a financial agent, or that its authority to issue notes was conferred or exercised with any special reference to other than private interests.

The bank declined to pay the tax, alleging it to be unconstitutional, and the collector of internal revenue, one Fenno, was proceeding to make a distraint in order to collect it, with penalty and costs, when, in order to prevent this, the bank paid it under protest. An unsuccessful claim having been made on the commissioner of internal revenue for reimbursement, suit was brought by the bank against the collector, in the court below.

The case was presented to that court upon an agreed statement of facts, and, upon a prayer for instructions to the jury, the judges found themselves opposed in opinion on three questions, the first of which—the two others differing from it in form only and not needing to be recited—was this:

"Whether the second clause of the 9th section of the act of Congress of the 13th of July, 1866, under which the tax in this case was levied and collected is a valid and constitutional law."

The Chief Justice delivered the opinion of the court.

. . . .

In support of the position that the act of Congress, so far as

it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness.

The first is that the tax in question is a direct tax, and has not been apportioned among the states agreeably to the Constitution.

The second is that the act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

. . . . . The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this Court, at the last term, in the case of *Pacific Insurance Co* v. *Soule* (7 Wallace 434), held not to be a direct tax.

Is it then a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?

We do not say that there may not be such a tax. It may be admitted that the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agents for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a state are necessarily exempt from taxation. . . . . .

. . . . . A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.

It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of

Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution, the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the National banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot

be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end Congress may restrain, by suitable enactments, the circulation, as money, of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration.

The three questions certified from the Circuit Court of the District of Maine must, therefore, be answered *affirmatively.*

As to the power of the legislature to make use of the power of taxation with the purpose of discouraging a particular business or occupation see Youngblood v. Sexton, 32 Mich., 406, *Infra.*

REES V. CITY OF WATERTOWN.

Supreme Court of the United States. October, 1873.
19 Wallace 107.

Appeal from the Circuit Court for the Western District of Wisconsin, the case being thus:

Rees, a citizen of Illinois, being owner of certain bonds issued under authority of an act of the Legislature of the State of Wisconsin, by the city of Watertown, in that State, to the Watertown and Madison Railway Company, and by the company sold for its benefit, brought suit in the Circuit Court of the United States for the District of Wisconsin against the city, and in 1867, recovered two judgments for about $10,000.

In the summer of 1868 he issued execution upon the two judgments thus obtained, which were returned wholly unsatisfied.

In November of the same year he procured from the United States Circuit Court a peremptory writ of mandamus, directing the city of Watertown to levy and collect a tax upon the taxable property of the city, to pay the said judgments; but before the writ could be served, a majority of the members of the city council resigned their offices. This fact was returned by the marshal, and proceedings upon the mandamus thereupon ceased.

In May, 1869, another board of aldermen having been elected,

Rees procured another writ of mandamus to be issued, which writ was served on all the aldermen except one Holger, who was sick at the time of the service upon the others. No steps were taken to comply with the requisition of the writ. An order to show cause why the aldermen should not be punished for contempt, in not complying with its requirements, was obtained, and before its return day six of the aldermen resigned their offices, leaving in office but one more than a quorum, of whom the said Holger, upon whom the writ had not been served, was one. Various proceedings were had and various excuses made, the whole resulting in an order that the aldermen should at once levy and collect the tax; but before the order could be served upon Holger, he resigned his office, and again the board was left without a quorum. Nothing was accomplished by their effort in aid of the plaintiff, but fines were imposed upon the recusant aldermen, which were ordered to be applied in discharge of the costs of the proceedings.

In October, 1870, the plaintiff obtained a third writ of mandamus, which resulted as the former ones had done, and by the same means, on the part of the officers of the city. A special election was ordered to be held to fill the vacancies of the aldermen so resigning, but no votes were cast, except three in one ward, and the person for whom they were cast refused to qualify. No part of the debt was ever paid.

. . . .

By the charter of the city of Watertown it was thus enacted:

"Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation, or contract of said city."

The case was tried in June, 1872, before two judges, holding the Circuit Court upon these questions:

"1. Whether, when the principal and interest on the bonds were unpaid, as well as the judgment, and there being no property on which to levy an execution, the plaintiff was confined to a remedy at law, by mandamus or otherwise, to enforce the payment of his judgment recovered in this court.

"2. Whether it was competent for the court, as a court of equity, on the failure of the officers of the city of Watertown to levy the tax as required by law, referred to in the bill, through their neglect, refusal, absence, or resignation, to appoint the marshall of the court to levy and collect the tax to pay the judgment."

. . . .

The judges were divided in opinion upon them and the bill was dismissed.

The case was now here on certificate of division and appeal, the error assigned being that the court dismissed the bill, when it ought to have given the relief prayed for.

. . . .

Mr. Justice HUNT delivered the opinion of the Court.

. . . .

We are of the opinion that this Court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important. The question is not entirely new in this court.

In the case of *Supervisors* v. *Rogers* (7 Wallace, 175), an order was made by this Court appointing the marshal a commissioner, with power to levy a tax upon the taxable property of the county, to pay the principal and interest of certain bonds issued by the county, the payment of which had been refused. That case was like the present, except that it occurred in the State of Iowa, and the proceeding was taken by the express authority of a statute of that State. The Court say: "The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment. This depends upon a provision of the code of the State of Iowa. This proceeding is found in a chapter regulating proceedings in the writ of mandamus, and the power is given to the Court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the Legislature that authorized their issue, and the appointment of the marshal as a commissioner in pursuance of the above section is to provide for the performance of this duty where the board has disobeyed or evaded the law of the State and the peremptory mandate of the Court."

The State of Wisconsin, of which the city of Watertown is a

municipal corporation, has passed no such act. The case of *Supervisors* v. *Rogers* is, therefore, of no authority in the case before us. The appropriate remedy of the plaintiff was and is a writ of mandamus (*Riggs* v. *Johnson County,* 6 Wallace, 193). This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. In the present case it has been thus far unavailing, and the prospect of its future success is, perhaps, not flattering. However this may be, we are aware of no authority in this Court to appoint its own officer to execute the duty thus neglected by the city in a case like the present.

In *Welch* v. *St. Genevieve* (10 Am. L. Reg., N. S., 512), at a Circuit Court for the District of Missouri, a tax was ordered to be levied by the marshal under similar circumstances. We are not able to recognize the authority of the case. No counsel appeared for the city (Mr. Reynolds as *amicus curiae* only); no authorities are cited which sustain the position taken by the court; the power of the court to make the order is disposed of in a single paragraph, and the execution of the order suspended for three months to give the corporation an opportunity to select officers and itself to levy and collect the tax, with the reservation of a longer suspension if it should appear advisable. The judge, in delivering the opinion of the court, states that the case is without precedent, and cites in support of its decision no other cases than that of *Riggs* v. *Johnson County* (9 Am. L. Reg., N. S., 415), and *Lansing* v. *Treasurer* (6 Wallace, 166). The first case cited does not touch the present point. The question in that case was whether a mandamus having been issued by a United States court in the regular course of proceedings, its operation could be stayed by an injunction from the State Court, and it was held that it could not be. It is probable that the case of *Supervisors* v. *Rogers* (7 Wallace, 175), was the one intended to be cited. This case has already been considered.

The case of *Lansing* v. *Treasurer* (also cited) arose within the State of Iowa. It fell within the case of *Supervisors* v. *Rogers* and was rightfully decided because authorized by the express statute of the State of Iowa. It offered no precedent for the decision of a case arising in a State where such a statute does not exist.

. . . .

Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies we should be quite willing to give him the aid requested, if the law permitted it.

We cannot, however, find authority for so doing, and we acquiesce in the conclusion of the court below, that the bill must be dismissed.

Judgment affirmed.

Mr Justice CLIFFORD, with whom concurred Mr. Justice SWAYNE, dissenting.

The court may however by mandamus order the exercise of its taxing powers by a municipal corporation or official authority. State v. New Orleans, 37 La. Ann. 16, *Infra.*

The power to tax being a legislative power, executive and administrative bodies have not the right to levy taxes in the absence of legislative authorization. Baldwin v. City Council, 53 Ala., 437; State v. Sickles, 4 Zabriskie (N. J. L.) 125 *Infra.*

II. DELEGATION OF THE TAXING POWER.

1. *To Private Corporations.*

CYPRESS POND DRAINING COMPANY V. HOOPER ET AL.

Court of Appeals of Kentucky. Summer Term, 1859.
*2 Metcalfe, *350.*

Judge DUVALL delivered the opinion of the Court.

By an Act of the Legislature, approved February 13, 1856 (Session Acts 1855-56, page 292), George Payne, George Henshaw, Thomas R. Given, James D. Ames, A. L. Churchill, and Willis G. Hughes, and the inhabitants living within the boundaries described in a subsequent section of the act, were "incorporated and made a body politic, by the name of the Cypress Pond Draining Company; and they and their successors shall have perpetual succession, and full power and authority to drain, and keep drained, the lands within the boundary hereinafter described, at the costs and charges of the owners and proprietors of the lands within said boundary; and to make all necessary and proper contracts therefor; to sue and be sued, plead and be impleaded, in all courts."

Power is given to the company to appoint all officers and agents necessary to carry into effect the provisions of the act, who are to be under the control of the president and managers of the company, and be removed by the company at pleasure.

The board of managers is made to consist of the persons above named, who, out of their number, are to elect a president, and to have power to fill all vacancies that may occur in the board. The boundary of the territory over which the powers of the corporation

*Century edition, Louisville, 1899.

are to be exercised is minutely defined, and comprehends an area of 14,621 acres, according to a survey which was subsequently made, as directed in the act. For the year 1856, and each year thereafter for ten years, the company is authorized to collect, on each acre of land within the boundary, a tax not exceeding twenty-five cents per acre, to be fixed by the board, who may cause an assessment to be made of each acre of land within the boundary, and list the same for collection with the sheriff of Union county, who shall collect and pay over the same to the order of the board. The sheriff shall have the same power to collect the taxes that he has to collect executions, and be entitled to the same compensation. With the money thus collected the board is required to drain certain creeks and ponds within said boundary, in such manner as they shall deem most practicable. The owners of any land sold under the provisions of the act are to have two years from the day of sale to redeem the same, by paying to the purchaser the amount of the sale, with ten per centum per annum on the amount.

Pursuant to the provisions of this act, a board of managers consisting of six persons named, was regularly organized. A tax of twenty-five cents on each acre of land embraced within the designated boundary was assessed, and the tax lists placed in the hands of the sheriff for collection.

The appellees, Hooper and thirty-three others, embraced within the corporate boundary and subjected to taxation under the act, filed this petition in equity in which they sought to enjoin the company from further proceedings to enforce the collection of the tax, upon the grounds that, as to them, the tax so assessed is unjust, unequal, and oppressive, and that the act authorizing it is unconstitutional; that said act was gotten up and passed without their knowledge or consent; that its passage was procured by persons who own a large quantity of inundated and wet lands within said boundary, which is comparatively worthless, but which, when drained as proposed, will be greatly enhanced in value, and was the object of the owners thus to enrich themselves by reclaiming their lands at the expense of the plaintiffs; that the lands owned by many of the plaintiffs are high and broken, not subject to inundation, and therefore not to be increased in value or otherwise benefited by the proposed draining; that many of them have resided on their farms within the boundary for a great many years. and that the creeks, ponds and wet lands to be drained have been of no detriment or disadvantage to them in any way.

The defendants, the president and managers of the company,

answered, denying that in procuring the passage of the act they were influenced by the motives ascribed to them, but insist that their object was to promote their own interest, at their own ratable expense, and the interest of others. They say the lands of the plaintiffs will be increased in value for agricultural purposes, and the health of the neighborhood improved; that the plaintiffs had knowledge of the intended application to the Legislature for the passage of the act, and that some of them signed the petition for that purpose.

Upon final hearing the Circuit Court was of opinion that the plaintiffs were entitled to the relief sought by them, and perpetuated their injunction. From that judgment the company has appealed.

. . . .

Upon the case thus presented the question arises, is the act of incorporation, the enforcement of which is sought to be resisted by the appellees, obligatory and binding upon them?

The corporation created by the act is essentially and strictly private. Its objects and purposes do not even partake of a public nature, but are confined exclusively to the private interests of the persons subjected to its operation.

But the constitutional power of the Legislature to impose local taxation for the accomplishment of local purposes, is too well settled to admit of question at this day. The principle has also been repeatedly recognized by the adjudications of this Court that an enactment peremptorily ordering the imposition of such local burthen would not depend for its validity upon the question whether it had been passed upon the petition of a majority, or less than a majority, of the citizens to be affected by it, or without a petition from any, or merely upon the general knowledge of the Legislature. (*Slack* v. *Maysville and Lexington R. R. Co.*, 13 B. Mon., 26; *Cheaney* v. *Hooser*, 9 B. Mon., 350.)

The power and discretion of the Legislature in the matter of local taxation is not, however, unlimited. Ample protection to the citizen against the oppression which might result from the arbitrary exercise of this power is secured in the clause of the Constitution which prohibits any man's property from being taken or applied to public use without just compensation made. (Art. 13, sec. 14.)

. . . .

It is clear, upon the facts established by the proof, that the operation and effect of the act incorporating this company, what-

ever may have been the object of those who procured its passage, is to appropriate the property of the appellees, without their consent, to the use of other private individuals merely; that a burthen has been imposed upon the appellees without any view to their interest in the objects to be accomplished by it; that it is a case of palpable and flagrant inequality in the burthen as imposed upon the persons and property included within the corporate boundary, and that the appellees are subjected to a local burthen for the private benefit of others, and for purposes in which they have no appreciable interest, and to which they are, therefore, not justly bound to contribute.

We need not comment upon some of the extraordinary provisions of the act of incorporation, by which the six managers named in the act of incorporation are given full power to assess and appropriate the taxes, to fill all vacancies in their own body, and, in short, to control and manage the entire business of the corporation, the other members having no voice or agency whatever in the management.

For the reasons already stated, we concur with the court below in the opinion that, as to the appellees, the act in question is inoperative and void, and the judgment is therefore affirmed.

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2. *To Municipal Corporations.*

EX PARTE THE CITY COUNCIL OF MONTGOMERY, IN RE KNOX.

Supreme Court of Alabama. December, 1879.
64 Alabama, 463.

In this case, a petition was filed in this Court, in the name of the State, on the relation of the City Council of Montgomery, asking that a *certiorari,* or such other remedial writ as might be necessary, directed to the Hon. Jas. Q. Smith, judge of the Second Judicial Circuit, to remove into this Court for revision the proceedings had before said Circuit Judge on a petition for *habeas corpus* sued out by Robert H. Knox, to procure his discharge from custody and imprisonment under a judgment and sentence rendered by the mayor of the city of Montgomery, for an alleged violation of a municipal ordinance. The ordinance imposed on lawyers a tax of sixteen dollars, as the price of a license for practicing their profession in the city of Montgomery, and provided that any person

who engaged in any business or occupation, or practiced any profession, for which a license was required, without first having procured a license as required, shall be guilty of a misdemeanor, and shall be fined, for each day, not less than ten, nor more than one hundred dollars; and by another ordinance it was further provided, that "when any person is convicted and fined for a breach of a city ordinance, and fails to pay the fine and costs, the mayor may commit him to custody, or to labor on the streets or other works of the city, one day for every dollar of the fine and costs, but not exceeding one hundred dollars in all for any one offense." Knox was a lawyer, regularly licensed by the Supreme Court, and practicing his profession in Montgomery; and having failed to take out a license, as required by the city ordinance, he was arrested and tried in the mayor's court, before one of the aldermen acting as mayor; and being found guilty, he was fined fifty dollars and costs, and, in default of payment, was sentenced to hard labor for the city, for the term of fifty-three days. Knox thereupon sued out a writ of *habeas corpus,* returnable before the Hon. J. Q. Smith; and on the hearing of the case, the only evidence being the judgment against him and the several ordinances under which the proceedings were had, the Circuit Judge discharged him. A copy of the city ordinances, the judgment and sentence against Knox, and the proceedings on the petition for *habeas corpus,* were made exhibits to the petition filed in this court; and the prayer of the petition was for a *certiorari, mandamus,* or other remedial writ, to bring the proceedings on *habeas corpus* before this court for review.

Brickell, C. J. By the charter of the city of Montgomery, the general assembly has conferred on the mayor and aldermen power to assess, levy and collect annually, a tax not exceeding one-half of one *per centum* on the value of real estate; and also "power and authority to pass laws for the assessment, levy and collection of taxes" on various occupations, trades, employments and professions; and among others, "on lawyers, doctors, dentists, photographers, and daguerrean artists, a tax not exceeding fifty dollars *per annum.*" It is not now to be doubted that, in the absence of constitutional restraint or limitation, the General Assembly may delegate to municipal corporations the power of taxation, in such manner, and to such extent, as it may deem expedient. It cannot confer on these corporations the power to tax persons or property which it does not itself possess; nor can the delegation exceed any limitation the constitution may impose. But, keeping within the

boundaries of its own power, to municipal corporations it may delegate the power to tax any and every subject of taxation within the corporate limits, for municipal purposes, which the State can tax for its own purposes. Not being restrained by the constitution, that the power to license or tax occupations, trades, employments, and professions, may by the General Assembly be delegated to municipal corporations, is not now in this court, an open question. *Yuille* v. *Mayor,* 3 Ala. 137; *Carroll* v. *Mayor,* 12 Ala. 173; *Osborne* v. *Mayor,* 44 Ala. 493; *Goldthwaite* v. *City Council,* 50 Ala. 486; *City Council* v. *Shoemaker,* 51 Ala. 144.

. . . .

3. The ordinance of the city of Montgomery requires, that any person engaged in any trade, business or profession, on which a tax is imposed, shall therefor obtain license. Engaging in such business without obtaining license, is declared a misdemeanor; and for each day such business, trade, or profession is carried on without license, a fine of not less than ten, nor more than one hundred dollars may be recovered. It is now urged, that the ordinance is void—that the express power of taxation which is conferred does not include the power to exact a license as a condition to engage in any of the trades, &c., which may be taxed. The power to tax occupations, privileges, &c., includes the power to license them, and to compel the payment of the tax as a condition precedent to entering upon such occupation, or exercising such privilege.—Burroughs on Taxation 392; *City Council* v. *Shoemaker, supra.*

Nor can we perceive that the ordinance is objectionable, because it visits with punishment by hard labor for the city a citizen who refuses to pay the tax, and yet engages in any one of the occupations for which a license is required. In that respect the ordinance is similar to the revenue statutes of the State; and unless such penalties are imposed, the corporate power of taxation could be defied and nullified by the refractory. The charter expressly confers on the city council the power to enact ordinances with penalties; and declares that "all persons convicted of any breach of the laws and ordinances of the city, failing to pay any fines and costs that may be imposed," may be placed at work and labor for the city, or under its direction, until such fine and costs are paid.

4. The omission of the State to tax lawyers does not affect the express power of the city to impose a tax upon them. That power is not thereby abrogated. It is of frequent occurrence, that the State omits to impose taxes of this kind, or omits some particular subject of taxation, to which the power of taxation of municipal

corporations extends, and no dimunition of that power is intended. At one period in the history of the State, for six or seven years, no State taxes were levied; but it was never supposed that, in consequence, the power of municipal corporations, conferred by their charters, was affected.

. . . .

6. The City Council did not exceed its power in the imposition of the tax, nor in any of the ordinances which have been passed to enforce its collection. The jurisdiction of the mayor, or of the alderman acting in his stead, to judge whether Knox had violated the ordinance, not being disputed, it follows, that the circuit judge had not jurisdiction, on *habeas corpus,* to discharge Knox from imprisonment; and his action in the premises is simply void, furnishing no obstacle to re-arrest under the judgment of the mayor. . . . . .

BALDWIN V. CITY COUNCIL.

PECK V. CITY COUNCIL.

Supreme Court of Alabama. December, 1875.
53 Alabama 437.

Brickell, C. J. These cases present a common question, the power of the city council of the city of Montgomery, to impose a tax on shares of the capital stock of national banks.

. . . .

It is not necessary in the view we are constrained to take of these cases, to inquire whether the tax levied and sought to be collected by the city council offends the limitations imposed by the act of Congress. Under the charter of the city, the power to levy taxes is confined to a tax on real estate, personal property, specifically enumerated, certain pursuits, callings, professions or occupations, or business of a particular kind, or the receipts or income from some particular business. There is no general power to impose taxes on personal property, nor any specific power which can be construed to authorize the tax of which the appellants complain. In the absence of special constitutional restriction, it is certainly true the legislature may confer on the municipalities it creates, such measure of power to levy and collect taxes as it may deem expedient, not greater or other than it possesses. It is equally certain that this power is capable only of clear and unequivocal delegation. When express power to levy and collect particular taxes

is conferred, the power to levy and collect other taxes is excluded. Or, if particular subjects of taxation are enumerated, the corporation has not capacity to enlarge them. The charter of the city, limited as it is to taxation of real estate, special occupations or pursuits, enumerated personal property, within no one of which shares in a corporation, or certainly in a bank, whether existing under State or Federal law, can be embraced, does not authorize the tax, the collection of which is sought to be prohibited. . . . . .

THE STATE (GEORGE HANCE, PROSECUTOR) V. SICKLES.

Court of Error and Appeals of New Jersey, June 1853.
4 Zabriskie 125.

This was a *certiorari*, directed to the collector of the town of Shrewsbury, in the county of Monmouth, to render into this court the assessment of taxes upon the prosecutor.

ELMER, J. It appears, by the depositions and exhibits submitted to us, that at the annual town meeting for the township of Shrewsbury, in the county of Monmouth, held on the eleventh day of March, 1851, pursuant to law, the inhabitants voted to raise —for roads, the sum of five hundred dollars, for the poor, the sum of five hundred dollars, for schools, "all the law allows," and "ways and means left to the committee." Claiming to act, as it would seem, under the authority of these votes, the township committee, on the fifth of September ensuing, made an order directed to the assessor, and purporting to be signed by a clerk *pro tem.*, in the following words: "You are hereby notified to assess four thousand nine hundred dollars to defray current expenses of the township for the present year, for roads, bridges, paupers, public schools and incidentals. N. B. The County and State tax is not included in the above."

To the sum thus ordered the assessor added the sum of eleven hundred eighty-four dollars, thirty-one cents, being the amount of county tax apportioned to the township, and made out his duplicate for the sum of six thousand and sixty dollars, eighty cents. The prosecutor's proportion of this assessment was the sum of one hundred and forty dollars and eighty cents.

The school money apportioned to the township amounted to four hundred ninety-nine dollars and one cent. Double this

sum was all the town meeting was authorized at that time to raise for schools. A resolution to raise "all the law allows" is somewhat vague; but, the amount being readily ascertained by the assessor, it would perhaps be too strict to consider it wholly void and inoperative. If the sum thus ordered to be raised for schools be added to the one thousand dollars ordered for the roads and the poor and the county tax, the total amount the assessor was authorized to assess will be the sum of three thousand one hundred and eighty-two dollars thirty-two cents and the fees of assessing, collecting and paying the same. The residue was illegal, and, so far as the prosecutor is concerned, must be set aside. It was decided at the last term of this court, in the case of *The State v. Bently,* that the assessor has no right to add anything for losses or other contingencies.

As to the order of the township committee, it was wholly illegal, and gave no authority to the assessor to increase the sum voted by the town meeting. The power vested in the inhabitants to order money to be raised by tax, is in itself a delegated power, and cannot be transferred to the town committee or any other officers. By law the committee is empowered to "examine, inspect, and report to the annual, or other town meetings, the accounts and vouchers of the township officers, and to superintend the expenditure of any moneys raised by tax for the use of the township, or which may arise from the balance of the accounts of any of the township officers," (Rev. Stat. 1024), but has no power to order any money to be raised which is not specially voted by the town meeting. The inhabitants composing the town meetings have themselves no general power to vote any money at their discretion, but are confined to raising it for such legal objects as are by law expressly vested in them (Rev. Stat. 1023, sec. 11). A vote, therefore, to raise a specified sum for "ways and means" would be illegal. Much more was it unwarranted to confer a power on the committee to raise for ways and means such sum as they might deem expedient.

The result, therefore, is that the prosecutor's proportion of the sum assessed, beyond what was authorized by the town meeting and the board of freeholders and the fees of assessing and collecting, must be deducted from his tax, and the residue affirmed. There being no evidence before us showing how much was properly added for fees, a commissioner must be appointed, in pursuance of the practice adopted by the court, to ascertain and report the deduction that ought to be made, upon the principles I have stated.

WILLIAM S. HOLT'S APPEAL.

Supreme Court of Rhode Island. September, 1855.
5 Rhode Island 603.

Appeal from a vote of school district No. 11, of the town of Exeter, authorizing the assessment of a tax.

From the statement of the school commissioner, presented to the chief justice for his decision, it appeared, that the district, at a special meeting, held October 9th, 1858, voted to repair their school house, at a cost not to exceed one hundred and fifty dollars, and that the clerk and trustee were appointed a committee to make the repairs; that the repairs were made, and, in addition, the house insured by the trustee, without a vote of the district authorizing the insurance; and that on the 30th day of October, the trustee called a special meeting of the district, of which the following was the notice:—

"NOTICE.

"Notice is hereby given, that there will be a meeting of the legal voters of School District No. 11, in the town of Exeter, in the school-house in said district, at two o'clock in the afternoon, on Saturday, the 6th of November, A. D. 1858, for the purpose of laying a tax on the ratable property of the district to meet the expense of repairing the school-house in said district, and of transacting any other business which may lawfully come before said meeting.

(Signed) DAVID NICHOLS, Trustee.

"Exeter, October 30th, 1858."

Upon this call, the district meeting was held at the time and place appointed, and voted to receive [repair] the school-house and assess a tax to the amount of one hundred and eighty-six dollars, including, in the amount of tax, the sum paid by the trustee for insurance.

From this vote, William S. Holt, a tax-payer in said district, appealed to the commissioner, alleging, as reasons, that the original vote limited the tax to a sum not exceeding one hundred and fifty dollars; that the notice of the meeting to assess a tax was illegal, inasmuch as it did not state that a sum greater than one hundred and fifty dollars was necessary to meet the expenses; that the amount of the tax above one hundred and fifty dollars has not been approved by the school committee of the town; that

one item of this additional expense was incurred by ceiling the walls between the window sills and the floor, which the district voted not to do; that the expense was also increased by the amount paid for insurance; that bills to the amount of one hundred and sixty-seven dollars only were presented at the meeting, the committee on repairs merely stating, that some of the bills had not been presented; and that the repairs had cost too much.

AMES, C. J. I am of the opinion that the fair construction of sect. 4 ch. 61, of the Revised Statutes, requires, that the amount of a tax to be levied by a school district on the ratable property within its limits, should be *first* approved by the school committee of the town. Such approval seems to me to be a condition of the right to raise the tax.

The power to insure the school-house and its appendages against damage by fire is, by section 3 of the same chapter, reposed in the district, and not in the trustee; and although a legal vote of the district to raise money to pay the premium would be a sufficient ratification of the trustee's act in this respect, the notice of the district meeting, held November 6, 1858, accompanying the statement, and which declares the special purpose of the meeting to be the "laying of a tax to meet the expenses of repairing the school-house in said district," seems to me not sufficient to justify the meeting in raising, as an addition to the tax, and by way of ratification of the action of the trustee in insuring the school-house, &c., the premium paid by the trustee for the insurance. The notice should, to comply with sect. 5, ch. 62, of the Revised Statutes, state the whole object or purpose of the special meeting.

The other grounds of the appeal cannot, upon the statement of facts submitted to me, be sustained; but, for the reasons above given, my decision is, that the assessment of the tax by School District No. 11 of the town of Exeter, at the special meeting held November 6, 1858, is void; and that having *first* obtained the approbation of the school committee of the town to the amount of the tax, they must, if they would levy it on the ratable property of the district, do so at a meeting, of the purposes of which due notice has been given. This will not be given, if, when the notice specifies that a tax is intended to be laid for one purpose only, the meeting proceeds to lay a tax for another also.

WILLIAMSON V. NEW JERSEY.

Supreme Court of the United States. October, 1888.
130 United States 189.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of New Jersey. The case arose on a writ of *certiorari* issued by that court at the instance of the mayor and common council of the city of New Brunswick, to review an assessment for taxation made by the township of North Brunswick, and a levy made by the collector of that township, against a farm known as the "poor farm," and personal property thereon, situated in the township of North Brunswick, and owned by the mayor and common council of the city of New Brunswick.

. . . .

It was agreed between the attorney for the plaintiff in the *certiorari* and the attorney for the defendant, that the sole question to be discussed in the Supreme Court of New Jersey was whether the poor farm, situated in the township of North Brunswick, and owned by the city of New Brunswick, was exempt from taxation; and that the poor farm referred to, the buildings thereon and the furniture and fixtures therein, were used exclusively for charitable purposes by the city of New Brunswick, the owner thereof.

. . . .

The Supreme Court held, 15 Vroom (44 N. J. Law,) 165, (1) that the declaration in the general law of 1866 that all acts and parts of acts whether special or local or otherwise, inconsistent with its provisions, were repealed, abrogated the provisions in the prior special act of 1862 for the taxation of the poor farm and the personal property thereon by the township of North Brunswick, because such provision in the act of 1862 was inconsistent with the provision of the act of 1866 exempting from taxation all property of the cities of the state and all property used exclusively for charitable purposes; (2) that the legislature could constitutionally repeal the power of taxing the poor farm and the personal property thereon, given by the act of 1862 to the township of North Brunswick.

. . . .

The judgment of the Supreme Court was that the assessment of taxes should be set aside. The collector of the township removed

the case, by writ of error, to the Court of Errors and Appeals of the State, which affirmed the judgment, in an opinion 17 Vroom, (46 N. J. Law,) 204, adopting the reasons given by the Supreme Court. The case having been remitted to the Supreme Court, the collector has brought it here by a writ of error to that court.

. . . .

We concur in the views of the Court of Errors and Appeals of New Jersey on this question. . . . . .

The true principle involved in the case is, whether the power of taxation on the part of a municipal corporation is private property, or a vested right of property, in its hands, which, when once conferred upon it by an act of the legislature cannot be subsequently modified or repealed. . . . . . The question arising is, therefore, whether the legislature which passed the act of February 18, 1862, could lawfully so grant the power of taxation to the township in perpetuity, that a subsequent legislature could not repeal or modify such grant of power.

We are clearly of opinion that such a grant of the power of taxation, by the legislature of a State, does not form such a contract between the State and the township as is within the protection of the provision of the Constitution of the United States which forbids the passage by a State of a law impairing the obligation of contracts. The conferring of such right of taxation is an exercise by the legislature of a public and governmental power. It is the imparting to the township of a portion of the power belonging to the State, which it can lawfully impart to a subordinate municipal corporation. But, from the very character of the power, it cannot be imparted in perpetuity, and is always subject to revocation, modification and control by the legislative authority of the State. The authorities to this effect are uniform.

. . . .

In the present case the second section of the act of February 18, 1862, has no more force than if the words "at all times hereafter" had been omitted; and the section is to be construed as if it only temporarily conferred the right of taxation on the township, subject to be recalled at the pleasure of the legislature. There is no element of private property in the right of taxation conferred upon a municipal corporation. Property acquired by paying for it with money raised by taxation is property. The legislation in question does not affect or interfere with any such property. The poor farm and the personal property thereon are not the property of the township of North Brunswick, but are the

property of the corporation of the city of New Brunswick. Nor is there anything violative of any provision of the Constitution of the United States in the enactment of the legislature of New Jersey, that the property in question shall be exempt from taxation because it is used exclusively for charitable purposes. The long recognized and universally prevalent policy of making such exemption is a warrant for saying that the 2nd section of the act of February 18, 1862, is fairly to be regarded as containing an implied reservation that such exemption might be thereafter made, as being the exercise of a public and governmental power, resting wholly in the discretion of the legislature, and not the subject of contract.

Judgment affirmed.

THE STATE EX REL. A. MARCHAND ET AL. V. THE CITY OF NEW ORLEANS.

Supreme Court of Louisiana. January, 1885.
37 Louisiana Annual 16.

Fenner, J. In 1872, the legislature of the State passed act No. 60 of that year, by which it established the Luzenberg Hospital in this city as the exclusive hospital for small-pox and further provided that "all indigent cases of small-pox or other diseases reported contagious, in want of or making application for hospital aid or care, shall be sent to the hospital designated in this act, at the expense of the city of New Orleans, as usual and at the usual *per diem.*"

Acting under this direction, the city entered into a contract with Dr. Anfoux then in charge of said hospital by which he was to receive and treat such patients at a stipulated compensation of thirty-five dollars per case. During the year 1873 he received and treated a large number of cases, for which the amount due by the city under the contract was $19,670.

In 1878 suit was brought and judgment recovered against the city on the foregoing cause of action and for the amount above stated, with interest and costs.

. . . . . The judgment has not been paid; and the evidence makes it manifest that under the city's construction of its duties, and under its modes of execution thereof, many years must elapse before any payment will be made upon this judgment.

The reason why this debt remains, and promises to remain,

unpaid, is that the city construes her power and duty of taxation to be governed and limited by the provision of the Constitution of 1879 to a tax of ten mills on the dollar, in so far as provision for such judgment is concerned, and that the requirements for her alimony leave, out of the receipts from this tax, nothing or little to be appropriated to the satisfaction of judgments.

To this the creditor answers that he is a creditor by contract; that, at the date of this contract, the city possessed, by law, a power of taxation for "current city expenses exclusive of interest and schools" only limited to one and one-quarter *per cent;* that *quoad* this contract obligation and so far as necessary for its satisfaction, this power of taxation still exists unaffected by subsequent legislative or constitutional provisions; that, under the Act No. 5 of 1870, it is the duty of the city authorities to provide for the payment of his registered judgment by setting apart in the annual budget a sum for that purpose, and that, in order to execute this duty, the correlative duty is imposed of exercising the power of taxation vested in the city by law to the extent necessary to raise the means to make such provision.

In pursuance of these views, the present suit was instituted for a mandamus directing the city authorities to execute and perform the duties imposed by Act No. 5 of 1870; and, in accordance therewith, to set apart in the next annual budget sufficient money to pay such judgment; and further directing them to provide in said budget, by taxation for current city expenses, in excess of the amount allowed by law for the alimony of the city but not in excess of one and one-quarter *per cent,* the means of revenue necessary to pay relator's said judgment, and so to do, in all succeeding annual budgets, until the same be paid.

From a judgment making the mandamus preemptory, the city has appealed.

We lay down the following propositions of fact and law, viz.:

1st. The judgment was founded on a contract entered into in 1872.

2d. At the date of the contract, the city possessed a power of taxation for general expenses "exclusive of interest and schools," of twelve and one-half mills *per annum.* See Act No. 73 of 1872, Sec. 15.

3d. Under the consistent jurisprudence of the Supreme Court of the United States and of this Court, the power of taxation existing at the date of the contract is read into the contract and continues to exist, so far as necessary for the enforcement of the

obligations of the contract, irrespective of any subsequent legislation or constitutional enactments restricting the power of taxation. State ex rel. Moore vs. City, 32 Ann., State ex rel. Dillon vs. City, 34 Ann. 477; State ex rel. Carriere vs. City, 36 Ann.; Von Hoffman vs. Quincy, 4 Wall. 535; Wolf vs. New Orleans, 103 U. S. 358; Nelson v. St. Martin, 111 U. S. 720.

4th. This court has long since held that the prohibitions against the issuance of the writ of mandamus against officers of the city of New Orleans contained in Act No. 5 of 1870, apply only to the cases therein specially designated and that, for the performance of the duties imposed by that act itself, the writ of mandamus was a proper remedy. State ex rel. Carondelet vs. New Orleans, 30 Ann. 129.

. . . .

So far as relator's contract and judgment are concerned, we have already shown that the city possesses a power of taxation for general purposes of twelve and one-half mills. She has, heretofore, exercised, and proposes hereafter to exercise this power only to the extent of *ten mills* on the dollar, and, as the revenues arising from this tax are applicable to, and required for, the necessary alimony of the city, they leave, as we have said, little or nothing which can be appropriated for the payment of registered judgments.

From the foregoing statement, it appears that, to the extent necessary for the provision for payment of plaintiff's judgment, the city possesses a residuary power of taxation of two and one-half mills, not exercised and which she refuses to exercise, the revenues from which would, under no circumstances, be applicable to the city's alimony, or, indeed, to any other purpose than that of satisfying relator's judgment and others standing in like case with it. It would be, indeed, an anomaly, if the city could escape from or postpone her clear duty, to provide for the satisfaction of such judgments, by simply abstaining from the exercise of lawful powers of taxation to an extent necessary to provide the means of paying them. Such an anomaly could never be sanctioned by any court of justice, since it would render the payment of debts no longer obligatory upon municipal corporations, but dependent purely upon their will and caprice.

From the foregoing considerations it would conclusively appear that relators are entitled to the relief which they seek, unless there is something in the nature of their debt, or in the law existing at the date of their contract. which debars it. Legislation

subsequent to the contract has, and can have no effect upon the rights and obligations arising from the contract.

. . . .

Let it be well understood that the duty to levy an extra tax is not obligatory under this decree. The city may satisfy the debt out of its revenues under the existing rate of taxation. But the insufficiency of such revenues will be no excuse for not satisfying the judgment and, if necessary, and *only* if necessary, must provision be made by a tax for general expenses above ten mills and within twelve and one-half mills.

Judgment affirmed.

Rehearing refused.

BERMUDEZ, C. J., and POCHE, J., take no part in this opinion and decree.

III. ALIENATION OF THE TAXING POWER.

1. *Statutory Exemptions From Taxation.*

RECTOR &c. OF CHRIST CHURCH V. COUNTY OF PHILADELPHIA.

Supreme Court of the United States. December, 1860.
24 Howard 300.

Mr. Justice CAMPBELL delivered the opinion of the court.

This cause comes before this court on a writ of error to the Supreme Court of Pennsylvania, under the 25th section of the act of Congress of the 24th of September, 1789. In the year 1833 the Legislature of Pennsylvania passed an act which recited "that Christ Church Hospital, in the city of Philadelphia, had for many years afforded an asylum to numerous poor and distressed widows, who would probably else have become a public charge; and it being represented that in consequence of the decay of the buildings of the hospital estate, and the increasing burden of taxes, its means are curtailed and its usefulness limited," they enacted, "that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes."

In the year 1851 the same authority enacted "that all property real and personal, belonging to any association or incorporated company which is now by law exempt from taxation, other than that

which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be and the same is hereby repealed." It was decided in the Supreme Court of Pennsylvania, that the exemption conferred on these plaintiffs by the act of 1833 was partially repealed by the act of 1851, and that an assessment of a portion of their real property under the act of 1851 was not repugnant to the Constitution of the United States, as tending to impair a legislative contract alleged to be contained in the act of Assembly of 1833 aforesaid.

The plaintiffs claim that the exemption conceded by the act of 1833 is perpetual, and that the act itself is in effect a contract. This concession of the Legislature was spontaneous, and no service or duty or other remunerative condition, was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia.* It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence.

Such an interpretation is not to be favored, as the power of taxation is necessary to the existence of the State, and must be exerted according to the varying conditions of the Commonwealth. The act of 1833 belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the Legislature. All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society. Bentham says, "that all laws may be said to be framed with a view to perpetuity; but perpetual is not synonomous to irrevocable; and the principle upon which all laws ought to be, and the greater part of them have been established, is that of defeasible perpetuity—a perpetuity defeasible by an alteration of the circumstances and reasons on which the law is founded." The inducements that moved the Legislature to concede the favor contained in the act of 1833 are special, and were probably temporary in their operation. The usefulness of the corporation had been curtailed in consequence of the decay of their buildings and the burden of taxes.

It may be supposed that in eighteen years the buildings would be

renovated, and that the corporation would be able afterwards to sustain some share of the taxation of the State. The act of 1851 embodies the sense of the Legislature to this effect.

It is in the nature of such a privilege as the act of 1833 confers, that it exists *bene placitum,* and may be revoked at the pleasure of the sovereign.

Such was the conclusion of the courts in Commonwealth v. Bird, 12 Mass. 442; Dale v. Governor, 3 Stew. 387; Alexander v. Willington, 2 Russ. & M. 35; 12 Harris 232; Lindley's Jurisp., sec. 42.

It is the opinion of the court that there is no error in the judgment of the Supreme Court, within the scope of the writ to that court, and its judgment is affirmed.

STATE OF NEW JERSEY V. WILSON.

Supreme Court of the United States. February, 1812.
7 Cranch 164.

Marshall, Ch. Justice, delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of last resort in the State of New Jersey, by which the Plaintiffs allege they are deprived of a right secured to them by the constitution of the United States.

The case appears to be this.

The remnant of the tribe of Delaware Indians, previous to the 20th of February, 1758, had claims to a considerable portion of lands in New Jersey, to extinguish which became an object with the government and proprietors under the conveyance from King Charles II., to the Duke of York. For this purpose a convention was held in February, 1758, between the Indians and commissioners appointed by the government of New Jersey; at which the Indians agreed to specify particularly the lands which they claimed; release their claim to all others; and to appoint certain chiefs to treat with commissioners on the part of the government for the final extinguishment of their whole claim.

On the 9th of August, 1758, the Indian deputies met the commissioners and delivered to them a proposition reduced to writing—the basis of which was, that the government should purchase a tract of land on which they might reside—in consideration of which

they would release their claim to all other lands in New Jersey south of the river Rariton.

This proposition appears to have been assented to by the commissioners; and the Legislature on the 12th of August, 1758, passed an act to give effect to this agreement.

This act, among other provisions, authorizes the purchase of lands for the Indians, restrains them from granting leases or making sales, and enacts "that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax, any law, usage or custom to the contrary thereof, in any wise notwithstanding."

In virtue of this act, the convention with the Indians was executed. Lands were purchased and conveyed to trustees for their use, and the Indians released their claim to the south part of New Jersey.

The Indians continued in peaceable possession of the lands thus conveyed to them until some time in the year 1801, when, having become desirous of migrating from the State of New Jersey, and of joining their brethren at Stockbridge, in the State of New York, they applied for, and obtained an act of the Legislature of New Jersey, authorizing a sale of their land in that State.

This act contains no expression in any manner respecting the privilege of exemption from taxation which was annexed to those lands by the act, under which they were purchased and settled on the Indians.

In 1803, the commissioners under the last recited act sold and conveyed the lands to the Plaintiffs, George Painter and others.

In October, 1804, the Legislature passed an act repealing that section of the act of August, 1758, which exempts the lands therein mentioned from taxation. The lands were then assessed, and the taxes demanded. The Plaintiffs thinking themselves injured by this assessment, brought the case before the Courts in the manner prescribed by the laws of New Jersey, and in the highest Court of the State, the validity of the repealing act was affirmed and the land declared liable to taxation. The cause is brought into this Court by writ of error, and the question here to be decided is, does the act of 1804 violate the Constitution of the United States?

The Constitution of the United States declares that no State shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

In the case of *Fletcher* v. *Peck,* it was decided in this Court on solemn argument and much deliberation, that this provision of the Constitution extends to contracts to which a State is party, as well as to contracts between individuals. The question then is narrowed to the enquiry whether in the case stated, a contract existed and whether that contract is violated by the act of 1804.

Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege as the sole condition on which the sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the State, with all its privileges and immunities. The purchaser succeeds, with the assent of the State, to all rights of the Indians. He stands, with respect to this land, in their place and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it.

. . . .

It is therefore considered by the Court, that the said judgment be reversed and annulled, and that the cause be remanded to the said Court of Errors, that judgment may be rendered therein annulling the assessment in the proceedings mentioned, so far as the same may respect the land in the said proceedings also mentioned.

2. *Exemptions Contained in Charters.*

HOME OF THE FRIENDLESS V. ROUSE.

Supreme Court of the United States. December, 1869.
8 Wallace 430.

Error to the Supreme Court of Missouri.

On the 3d of February, 1853, the Legislature of Missouri passed "an act to incorporate the Home of the Friendless, in the city of St. Louis."

. . . .

The corporation was organized and set in action, and by gifts, grants, and devises, had acquired a considerable amount of real estate in St. Louis. A constitution adopted by the State in the year 1865, authorized the Legislature to impose certain taxes, and soon after, the Legislature did impose a tax upon the real property of the Home. The corporation declining to pay, the collector of taxes for the county was about to levy on and sell its real estate, when the corporation filed a bill in one of the State courts, praying for an injunction against collecting the taxes, on the ground that they were illegally assessed, all property of the Home being, by its act of incorporation, expressly exempted from taxation at all times. The defendant interposed a demurrer, which was overruled, and the judgment on the demurrer made final. The cause was removed to the Supreme Court of the State, and resulted in the reversal of the judgment of the lower court, and the dismissal of the bill or petition.

. . . .

Mr. Justice Davis delivered the opinion of the court.

The object for which the Home of the Friendless was incorporated was to enable those persons of the female sex, who were desirous of establishing a charitable institution in St. Louis for the relief of destitute and suffering females, to carry out their laudable undertaking.

It can readily be seen that a charity of this kind would be of great benefit to the people of St. Louis, and that the Legislature of the State would naturally be desirous of using all proper means to promote it. The purposes to be attained by such a charity are usually beyond the ability of individual effort, and require an association of persons who will themselves contribute pecuniary aid, and are willing to become solicitors for the contributions of others. Usually the initiation of such an enterprise is in the

hands of a few persons who need to be clothed with more than ordinary powers in order to obtain the successful co-operation of others. In no way could this co-operation be better secured than by conferring upon the corporators the authority to say to the benevolent people of St. Louis, that their donations in money or lands, for the relief of the suffering female poor of the city, would be held by the institution undiminished by taxation.

It was doubtless under the influence of these considerations, and because every government wishes to encourage benevolent enterprises, that the Legislature granted the charter for the Home of the Friendless, and said to the charitable persons engaged in this business, that if they would organize the society and conduct its affairs, would give themselves and solicit others to give for the common purpose, "that the property of the corporation shall be exempt from taxation." This charter is a contract between the State of Missouri and the corporators that the property given for the charitable uses specified in it, shall, so long as it is applied to these uses, be exempted from taxation. It follows, that any attempt to tax it impairs the obligation of the contract. . . . .

It is objected that there is no consideration stated in the act for the release from taxation, which it is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject.

There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the Legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of *Dartmouth College* v. *Woodward.*

It is contended that the rules of construction applicable to legislative contracts are more stringent than those which are applied to contracts between natural persons, and that, applying these rules to this contract, it cannot be sustained as a perpetual exemption from taxation.

It is true that legislative contracts are to be construed most favorably to the State if on a fair consideration to be given the charter, any reasonable doubts arise as to their proper interpretation; but, as every contract is to be construed to accomplish the intention of the parties to it, if there is no ambiguity about it, and this intention clearly appears on reading the instrument, it is as much the duty of the court to uphold and sustain it, as if it were

a contract between private persons. Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. "All property of said corporation shall be exempt from taxation," are the words used in the act of incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word "forever" after the word "taxation" could not make the meaning any clearer.

It was undoubtedly the purpose of the Legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the Legislature, without taking direct action on the subject, could at its will, resume the power of taxation. This view is fortified by the provisions of the general law of the State regarding corporations, in force at the time this charter was granted, and which the Legislature declared should not apply to this corporation. The seventh section of the act concerning corporations, approved March 19, 1845, provided that "the charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension and repeal, in the discretion of the Legislature." As the charter in controversy was granted in 1853, it would have been subject to this general law if the Legislature had not, in express terms, withdrawn from it this discretionary authority. Why the necessity of doing this if the exemption from taxation was only understood to continue at the pleasure of the Legislature?

The validity of this contract is questioned at the bar on the ground that the Legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of this court, that a State may, by a contract based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period, or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the State if the charter containing it is accepted.*

It is proper to say that the present Constitution of Missouri prohibits the Legislature from entering into a contract which exempts the property of an individual or corporation from taxation, but

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**New Jersey* v. *Wilson,* 7 Cranch 164; *Gordon* v. *Tax Appeal Court,* 3 Howard 133; *Piqua Bank* v. *Knoop,* 16 Id. 369; *Ohio Life and Trust Company,* v. *Debolt,* 16 Id. 416; *Dodge* v. *Wilson,* 18 Id. 331; *Mechanics' & Traders' Bank* v. *Thomas,* Ib. 384; *Mechanics' & Traders' Bank* v. *Debolt,* Ib. 380; *McGee* v. *Mathis,* 4 Wallace 143.

when the charter in question was passed there was no constitutional restraint on the action of the Legislature in this regard.

Without pursuing the subject further, we are of the opinion that the State of Missouri did make a contract on sufficient consideration with the Home of the Friendless, to exempt the property of the corporation from taxation, and that the attempt made on behalf of the State through its authorized agent, notwithstanding this agreement to compel it to pay taxes, is an indirect mode of impairing the obligation of the contract, and cannot be allowed.

JUDGMENT REVERSED, and the cause remanded to the court below, with directions to proceed

IN CONFORMITY WITH THIS OPINION.

The CHIEF JUSTICE, with MILLER and FIELD, JJ., dissented.

COVINGTON V. KENTUCKY.

Supreme Court of the United States. October, 1898.
173 United States, 231.

Mr. Justice HARLAN delivered the opinion of the court.

The plaintiff in error, a municipal corporation of Kentucky, insists that by the final judgment of the Court of Appeals of that Commonwealth sustaining the validity of certain taxation of its waterworks property, it has been deprived of rights secured by that clause in the Constitution of the United States which prohibits any State from passing a law impairing the obligation of contracts. That is the only question which this court has jurisdiction to determine upon this writ of error. Rev. Stat. § 709.

By an Act of the General Assembly of Kentucky, approved May 1, 1886, the city of Covington was authorized to build a water reservoir or reservoirs within or outside its corporate limits, either in the county of Kenton or in any county adjacent thereto, and acquire by purchase or condemnation in fee simple the lands necessary for such reservoirs, and connect the same with the water-pipe system then existing in the city; to build a pumping house near or adjacent to the Ohio river, and provide the same with all necessary machinery and appliances, together with such lands as might be needed for the pumping house, and for connecting it with said reservoir or reservoirs. § 21.

. . . .

By Section 31 of that act it was provided that "said reservoir

or reservoirs, machinery, pipes, mains and appurtances, with the land upon which they are situated, shall be and remain forever exempt from state, county and city tax." Ky. Acts, 1885-6, c. 897, p. 317.

. . . .

By the Kentucky Statutes of 1894, it is provided:

"§ 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

. . . .

This act repealed all acts and parts of acts in conflict with its provisions, except the act of June 4, 1892, providing additional funds for the ordinary expenses of the State government, and the act amendatory thereof approved July 6, 1892.

In the year 1895, certain lands acquired under the above act of May 1, 1886, and constituting a part of the Covington Water Works, were assessed for State and county taxation, pursuant to the statutes enacted after the passage of that act, and conformably as well to the Constitution of Kentucky if that instrument did not exempt them from taxation. The taxes so assessed not having been paid, those lands after due notice were sold at public outcry by the sheriff, (who by law was the collector of State and county revenue,) and no other bidder appearing, the Commonwealth of Kentucky purchased them for $2,187.24, the amount of the taxes, penalty, commission and cost of advertising.

The present action was brought by the Commonwealth to recover possession of the property so purchased.

The principal defense is that the provision in the act of May 1, 1886, that the reservoir or reservoirs, pumping house, machinery, pipes, mains and appurtenances, with the land upon which they are situated, "shall be and remain forever exempt from state, county and city taxes," constituted, in respect of the lands in question, a contract between the city of Covington and the Commonwealth of Kentucky, the obligation of which was impaired by the subsequent legislation to which reference has been made.

Referring to Section 170 of the present Constitution of Kentucky

declaring that "there shall be exempt from taxation public property used for public purposes," the Court of Appeals of Kentucky, in this case, said: " . . . . In our opinion, the property in question is, under the Constitution, subject to taxation, and the statute enacted in pursuance of it operated to repeal the special act of May 1, 1886."

However much we may doubt the soundness of any interpretation of the State Constitution implying that lands and buildings are not public property used for public purposes when owned and used under legislative authority by a municipal corporation, one of the instrumentalities or agencies of the State, for the purpose, and only for the purpose, of supplying that corporation and its people with water, and when the net revenue from such property must be applied in the improvement of public ways, we must assume, in conformity with the judgment of the highest court of Kentucky, that Section 170 of the Constitution of that Commonwealth cannot be construed as exempting the lands in question from taxation. .

. . . .

The fundamental question in the case then is whether at the time of the adoption of that Constitution the city of Covington had in respect of the lands in question, any contract with the State, the obligation of which could not be impaired by any subsequent statute or by the present Constitution of Kentucky, adopted in 1891. If the exemption found in the act of 1886 was such a contract, then it could not be affected by that Constitution any more than by a legislative enactment.

We are of opinion that the exemption from taxation embodied in that act did not tie the hands of the Commonwealth of Kentucky so that it could not, by legislation, withdraw such exemption and subject the property in question to taxation. The act of 1886 was passed subject to the provision in a general statute of Kentucky, above referred to, that all statutes "shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed." If that act in any sense constituted a contract between the city and the Commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract.

. . . .

If, however, the property in question be regarded as in some sense held by the city in its governmental or public character, and therefore as public property devoted to public purposes—which is the interpretation of the State Constitution for which the city con-

tends—there would still be no ground for holding that the city had in the Act of 1886 a contract within the meaning of the Constitution of the United States. A municipal corporation is a public instrumentality established to aid in the administration of the affairs of the State. Neither its charter nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract within the meaning of the Constitution of the United States. If the Legislature chooses to subject to taxation public property held by a municipal corporation of the State for public purposes, the validity of such legislation, so far as the national Constitution is concerned, could not be questioned.

In *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 91, after referring to previous adjudications, this court said that the authorities were full and conclusive to the point that a municipal corporation, being a mere agent of the State, "stands in its governmental or public character in no contract relations with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection." Chancellor Kent, in his Commentaries says: "In respect to public or municipal corporations, which exist *only* for public purposes, as counties, cities and towns, the legislature, under proper limitations, has a right to change, modify, enlarge, restrain or destroy them; securing, however, the property for the uses of those for whom it was purchased. A public corporation, instituted for purposes connected with the administration of the government, may be controlled by the legislature, because such a corporation is not a contract within the purview of the Constitution of the United States. In those public corporations there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public." 2 Kent's Com., 12th ed, p. *306. Dillon says: "Public, including municipal, corporations are called into being at the pleasure of the State, and while the State may, and in the case of municipal corporations usually does, it need not, obtain the consent of the people of the locality to be affected. The charter or incorporating act of a municipal corporation is in no sense a contract between the State and the corporation, although, as we shall presently see, vested rights in favor of third persons, if not indeed in favor of the corporation or rather the community which is incorporated, may arise under it. Public corporations within the meaning of this rule are such as are established for public purposes

exclusively—that is, for purposes connected with the administration of civil or of local government—and corporations are public only when, in the language of Chief Justice Marshall, 'the whole interests and franchises are the exclusive property and domain of the government itself,' such as *quasi* corporations (so-called), counties and towns or cities upon which are conferred the powers of local administration. Subject to constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent; it may, where there is no constitutional inhibition, erect, change, divide and even abolish them at pleasure, as it deems the public good to require." 1 Dillon's Munic. Cor. 4th ed. p. 93, § 54.

In any view of the case there is no escape from the conclusion that the city of Covington has no contract with the State exempting the property in question from taxation which is protected by the contract clause of the National Constitution.

Perceiving no error in the record of which this court may take cognizance the judgment is affirmed.

As to power to make exemptions see Chapter VI. *Equality and Uniformity in Taxation.*

CHAPTER III.

LIMITATIONS OF THE TAXING POWER BY PARAMOUNT LAW.

I. Effect of Theory of Federal Government.

1. *General Principles.*

M'CULLOCH V. THE STATE OF MARYLAND.

Supreme Court of the United States. February, 1819.
4 Wheaton, 316.

Error to the Court of Appeals of the State of Maryland.

This was an action of debt brought by the defendant in error, John James, who sued as well for himself as for the State of Maryland, in the County Court of Baltimore County, in said State, against the plaintiff in error, M'Culloch, to recover certain penalties under the act of the legislature of Maryland, hereafter mentioned. Judgment being rendered against the plaintiff in error, upon the following statement of facts, agreed and submitted to the Court by the parties, was affirmed by the Court of Appeals of the State of Maryland, the highest Court of law of said State, and the cause was brought, by writ of error, to this Court

It is admitted by the parties in this cause, by their counsel, that there was passed on the 10th day of April, 1816, by the Congress of the United States, an act, entitled, "an act to incorporate the subscribers to the Bank of the United States;" and that there was passed, on the 11th day of February, 1818, by the General Assembly of Maryland, an act, entitled, "an act to impose a tax on all Banks, or branches thereof, in the State of Maryland, *not chartered by the legislature.*" . . . .

Mr. Chief Justice Marshall delivered the opinion of the Court.

. . . .

It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2. Whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. . . . .

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case; but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitutions and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st, that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

. . . .

The power of Congress to create, and, of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction,

no principle not declared, can be admissable, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution. . . . . It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may chuse to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised on every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a State extends to everything which exists

by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

. . . .

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a fair construction of the constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

. . . .

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all

the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. Thev did not design to make their government dependent on the States.

. . . .

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and, is consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

CARPENTER ET AL V. SNELLING.

Supreme Judicial Court of Massachusetts. October, 1867.
97 Massachusetts, 452.

Replevin by the assignees in insolvency of the estate of George W. Pettes.

. . . .

The plaintiffs contended that the papers which passed between Pettes and the defendant constituted a mortgage; that they were not so stamped with internal revenue stamps of the United States as to authorize the defendant to introduce them in evidence to show title to the property.

. . . .

BIGELOW, C. J. The only remaining question is whether the writ-

ten instruments under which the defendant claims the property in dispute should have been excluded for want of sufficient stamps under the provisions of the revenue laws of the United States.

. . . .

But there is another view of this part of the case which leads us to the conclusion that the want of a stamp did not render the written document offered by the defendant inadmissible. The provision of the statute of the United States already cited does not in terms apply to the courts of the several states. The language of the enactment is only that no instruments or documents not duly stamped shall "be admitted or used as evidence in any court" until the requisite stamps shall be affixed. This provision can have full operation and effect if construed as intended to apply to those courts only which have been established under the constitution of the United States and by acts of Congress, over which the federal legislature can legitimately exercise control, and to which they can properly prescribe rules regulating the course of justice and the mode of administering justice. We are not disposed to give a broader interpretation to the statute. We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states, which shall be obligatory upon them. We are not aware that the existence of such a power has ever been judicially sanctioned. There are numerous and weighty arguments against its existence. We cannot hold that there was an intention to exercise it, where, as in the provision now under consideration, the language is fairly susceptible of a meaning which will give it full operation and effect within the recognized scope of the constitutional authority of Congress.

Exceptions overruled.

THE COLLECTOR V. DAY.

Supreme Court of the United States. December, 1870.
11 Wallace 113.

Mr. Justice Nelson delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State?

In *Dobbins* v. *The Commissioners of Erie County,* 16 Peters

435, it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

. . . . . And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a State.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.

. . . . . . Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities

employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax.

. . . . . . It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the *Veazie Bank* v. *Fenno,* 8 Wallace 533, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *M'Culloch* v. *Maryland,* namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject, at all, to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain.

Mr. Justice BRADLEY, dissenting.

2. *Taxation of Government Bonds.*

WESTON ET AL V. THE CITY COUNCIL OF CHARLESTON.

Supreme Court of the United States. January, 1829.
2 Peters, 449.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

. . . .

This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by states and corporations?*

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

If the states and corporations throughout the Union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

. . . .

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burthened, impeded, if not arrested, by any of the organized parts of the confederacy.

. . . .

This subject was brought before the court in the case of *M'Cullough* v. *The State of Maryland,* 4 Wheaton 316, when it was thoroughly argued and deliberately considered. The question

*The ordinance imposing the tax under consideration imposed a tax of twenty-five cents on every hundred dollars on certain enumerated kinds of personal property including "six and seven per cent stock of the United States."

decided in that case bears a near resemblance to that which is involved in this. . . . .

We retain the opinions which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any state in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *M'Culloch* v. *The State of Maryland,* to be exempt from state taxation, and consequently from being taxed by corporations deriving their power from states.

It is admitted that the power of the government to borrow money can not be directly opposed, and that any law directly obstructing its operation would be void; but, a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the intimate connection which exists between these two modes of acting on the subject.

It is not the want of original power in an independent sovereign state, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our Constitution. The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely.

. . . .

It has been supposed that a tax on stock comes within the exceptions stated in the case of *M'Cullough* v. *The State of Maryland.* We do not think so. The Bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied.

But property acquired by that corporation in a state was supposed to be placed in the same condition with property acquired by an individual.

The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.

We are, therefore, of opinion that the judgment of the Constitutional Court of the State of South Carolina, reversing the order made by the Court of Common Pleas, awarding a prohibition to the City Council of Charleston, to restrain them from levying a tax imposed on six and seven per cent stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston for the year 1823, is erroneous in this: that the said Constitutional Court adjudged that the said ordinance was not repugnant to the Constitution of the United States; whereas, this Court is of opinion that such repugnancy does exist. We are, therefore, of opinion that said judgment ought to be reversed and annulled, and the cause remanded to the Constitutional Court for the State of South Carolina, that further proceedings may be had therein according to law.

Mr. Justice JOHNSON, dissentiente.

BANK OF COMMERCE V. NEW YORK CITY.

Supreme Court of the United States. December, 1862.
2 Black, 620.

Mr. Justice NELSON.

This is a writ of error to the Court of Appeals of the State of New York.

The question involved in this case is, whether or not the stock of the United States, constituting a part or the whole of the capital stock of a bank organzed under the banking laws of New York, is subject to State taxation. The capital of the bank is taxed under existing laws in that State upon valuation like the property of individual citizens, and not as formerly on the amount of the nominal capital, without regard to loss or depreciation.

According to that system of taxation it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it.

The tax was like one annexed to the franchise as a royalty for

the grant. But since the change of this system it is agreed the tax is upon the property constituting the capital.

This stock then is held by the bank the same as such stocks are held by individuals, and alike subject to taxation or exemption by State authority. On the part of the bank it is claimed that the question was decided in the case of *Weston et als.* v. *The City Councils of Charleston* (2 Peters, 449), in favor of exemption. In that case the stocks were in the hands of individuals which were taxed by the city authorities under a law of the State. The Court held the law imposing the tax unconstitutional. This decision would seem not only to cover the case before us, but to determine the very point involved in it.

It has been argued, however, that the form or mode of levying the tax under the ordinance of the City of Charleston was different from that of the law of New York, and hence may well distinguish the case and its principles from the present one. This difference consists in the circumstance that the tax in the former case was imposed on the stock, *eo nomine* whereas in the present it is taxed in the aggregate of the tax-payer's property, and to be valued at its real worth in the same manner as all other items of his taxable property. The stock is not taxed by name, and no discrimination is made in favor or against it, but is regarded like any other security for money or chose in action.

It is true that the ordinance imposing the tax in the case of *Weston* v. *The City of Charleston* did discriminate between the stock of the United States and other property—that is, the ordinance did not purport to impose a tax upon all the property owned by the tax-payers of the City, and specially excepted certain property altogether from taxation. The only uniformity in the taxation was that it was levied equally upon the articles enumerated, and which were taxed. To this extent it might be regarded as a tax on the stock *eo nomine.*

But does this distinction thus put forth between the two cases distinguish them in principle? The argument admits that a tax *eo nomine,* or one that distinguishes unfavorably the stock of the United States from the other property of the tax-payer, cannot be upheld. Why? Because, as is said, if this power to discriminate be admitted to belong to the State, it might be exercised to the destruction of the value of the stock, and consequently of the power or function of the Federal Government to issue it for any practical uses.

It will be seen, therefore, that the distinction claimed rests upon

a limitation of the exercise of the taxing power of the State; that if the tax is imposed indiscriminately upon all the property of the individual or corporation, the stock may be included in the valuation; if not, it must be excluded or cannot be reached.

. . . .

Upon looking at the case of *Weston* v. *The City of Charleston,* it will be seen that the decision of a majority of the court was not at all placed upon the distinction we have been considering, but upon ground much broader and wholly independent of it.

The tax upon the stocks was regarded as a tax upon the exercise of the power of Congress "to borrow money on the credit of the United States." The exercise of this power was interfered with to the extent of the tax imposed by the City authorities, that the liability of the certificates of stock to taxation by a State in the hands of an individual affected their value in the market, and the free and unrestrained exercise of the power. The Chief Justice observes, that "if the right to impose a tax exists, it is a right which, in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State or corporation may prescribe.

. . . .

It is apparent in studying this opinion in connection with the opinions of the Court in the cases of *McCullough* v. *The State of Maryland* (4 Wh., 116), and of *Osborne* v. *The United States* (9 Wh., 732), that it is but a corollary from the doctrines so ably expounded by the Chief Justice in the two previous cases in the interpretation of an analogous power in the Constitution.

The doctrine maintained in those cases is, that the powers granted by the people of the States to the General Government, and embodied in the Constitution, are supreme within their scope and operation, and that this Government may exercise these powers in its appropriate departments, free and unobstructed by any State legislation or authority. That within this limit this Government is sovereign and independent, and any interference by the State governments, tending to the interruption of the full legitimate exercise of the powers thus granted, is in conflict with that clause of the Constitution which makes the Constitution and the laws of the United States passed in pursuance thereof "the supreme law of the land."

The result of this doctrine is, that the exercise of any authority by a State Government trenching upon any of the powers granted

to the General Government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power. For, as truly said by the Chief Justice in the case of *Weston* v. *The City of Charleston,* in respect to the taxing power of the State, "if the right to impose the tax exists, it is a right which, in its nature, acknowledges no limit, it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe."

. . . .

. . . . . The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the General Government and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means if another Government may tax it at discretion. It is apparent that the power, function, or means, however important and vital, are at the mercy of that Government. And it must be always remembered, if the right to impose a tax at all exists on the part of the other Government, "it is a right which in its nature acknowledges no limits." And the principle is equally true in respect to every other power or function of a Government subject to the control of another.

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HOME INSURANCE CO. V. NEW YORK STATE.

Supreme Court of the United States. April, 1890.
134 United States, 594.

The plaintiff in error, The Home Insurance Company of New York, is a corporation created under the laws of that State. Its capital stock during the year 1881 was three millions of dollars, divided into thirty thousand shares of the par value of one hundred dollars each, all fully paid. In the months of January and July of that year a dividend of $150,000 was declared by the company, making together ten per cent upon the par value of its stock. A portion of that capital stock was invested in bonds of the United States, amounting, when the dividend was declared in July, 1881, and also on the first of November of that year, to $1,940,000.

By an act of the legislature of New York, passed May 26, 1881, c. 361, amending a previous act providing for the taxation of certain corporations, joint stock companies and associations, it was declared that every corporation, joint stock company or association, then or thereafter incorporated under any law of the State, or of any other State or country, and doing business in the State, with certain designated exceptions not material in this case, should be subject to a tax upon "its corporate franchise or business."

. . . .

The tax payable by the Home Insurance Company, estimated according to its dividends, under the above law of the State, aggregated $7,500. . . . . .

Mr. Justice FIELD, after stating the case, delivered the opinion of the court.

The contention of the plaintiff in error is that the tax in question was levied upon its capital stock, and therefore invalid so far as the bonds of the United States constitute a part of that stock. If that contention were well founded there would be no question as to the invalidity of the tax. That the bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a State is familiar law settled by numerous adjudications of this Court. It is a tax upon the exercise of the power of Congress to borrow money; a tax which, if permitted, could be limited in amount only by the discretion of the State, and might therefore be carried to an extent impairing, if not destructive of, the efficiency of the power, to the serious detriment of the general government.

. . . .

Nor can this inhibition upon the States be evaded by any change in the mode or form of the taxation, provided the same result is effected—that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon a power of the Government, the law creating it will be set aside or its enforcement restrained.

. . . .

Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United

States composing a part of that stock. The statute designates it a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

By the term "corporate franchise or business," as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation—that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a federal tribunal.

. . . . . If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the Legislature of the State; it cannot be furnished by the federal tribunals.

The tax in the present case would not be affected if the nature

of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York, or of other States. From the very nature of the tax, being laid upon a franchise given by the state, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the condition upon which it shall be exercised, is as ample and plenary in the one case as in the other.

. . . .

This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in *Society for Savings* v. *Coite,* 6 Wall. 594, and *Provident Institution* v. *Massachusetts,* 6 Wall. 611, which were before this Court at December Term, 1867. In the first of these cases it appeared that a law of Connecticut of 1863 provided that savings banks in that State should make an annual return to the controller of public accounts "of the total amounts of all deposits in them, respectively, on the first day of July in each successive year," and should pay to the treasurer of the State a sum equal to three-fourths of one per cent on the total amount of deposits in such banks on those days, and that the tax should be in lieu of all other taxes upon the banks or their deposits. On the first day of July, 1863, the Society for Savings, one of the banks, had invested over $500,000 of its deposits in securities of the United States, which were declared by Congress to be exempted from taxation by state authority, whether held by individuals, corporations, or associations. 12 Stat. 346, c. 33, § 2. Upon the amount of its deposits thus invested the society refused to pay the sum equal to the prescribed percentage. In a suit brought by the treasurer of the State to recover the tax, the payment of which was thus refused, the Supreme Court of Connecticut held that the tax was not on property but on the corporation as such. The case being brought here, the judgment was affirmed, this Court holding that the tax was on the franchise of the corporation and not upon its property, and the fact that a part of the deposits was invested in securities of the United States did not exempt the society from the tax. Said the Court: "Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the State Government. Authority to that effect resides in the State independent of the federal

government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in federal securities." Pages 606-607.

It was contended in that case that the deposits in the bank were subjected to taxation from the fact that the extent of the tax was determined by their amount. But the court said: "Reference is evidently made to the total amount of deposits on the day named, not as the subject matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should contribute to the public burdens. Views of the defendants are, that the sums required to be paid to the treasury of the State is a tax on the assets of the institution, but there is not a word in the provision which gives any satisfactory support to that proposition. Different modes of taxation are adopted in different States, and even in the same State at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a definite period. Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the Legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained." P. 608.

In the second case mentioned, *Provident Institution* v. *Massachusetts,* it appeared that the statute of Massachusetts, passed in 1862, levying taxes on certain insurance companies and depositors in savings banks, provided that every institution for savings incorporated under its laws should pay to the commonwealth a tax of one-half of one per cent per annum on the amount of its deposits, to be assessed one-half of said annual tax on the average amount of its deposits for the six months preceding the 1st day of May, and the other half on the average amount of its deposits for the six months preceding the 1st day of November. The Provident Institution for Savings in that State was authorized to invest its deposits in securities of the United States. Its average amount of

deposits for the six months preceding the 1st day of May, 1865, was over eight millions, of which over one million was invested in such securities. It paid all the taxes demanded except on the portion which was thus invested. Upon that it declined to pay the tax. In a suit brought by the commonwealth to recover the same, the Supreme Judicial Court of the State held that the tax was one on the franchise of the company and not on the property, and therefore gave judgment for the commonwealth. The case being brought here, the judgment was affirmed. In deciding the case, this court said, referring to a section of the statute under which the tax was levied: "Deposits, as the word is employed in that section, are the sums received by the institution from depositors, without regard to the nature of the funds. They are not capital stock in any sense, nor are they even investments, as the word is there used, which simply means the sums received wholly irrespective of the disposition made of the same, or their market value." And speaking of the difference existing between taxes on franchises and taxes upon property it said: "Franchise taxes are levied directly by an act of the legislature, and the corporations are required to pay the amount into the state treasury. They differ from property taxes as levied for state and municipal purposes in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection." And again, "Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individiual, but the amount of a franchise tax depends upon the business transacted by the corporation and the extent to which they have exercised the privileges granted in their charter." Pages 631, 632.

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In *Hamilton Company* v. *Massachusetts,* 6 Wall. 632, a statute of Massachusetts which required corporations having a capital stock divided into shares, to pay a tax of a certain percentage upon the excess of the market value of such stock over the value of its real estate and machinery, was sustained as a statute imposing a franchise tax, notwithstanding a portion of the property consisted of securities of the United States; this court, however, placing its decision upon the fact that under the provisions of the State constitution and the practice under it the tax had been so considered by the highest tribunal of the State. This decision goes much farther than is necessary to sustain the judgment of the Court of Appeals of New York in the present case.

In this case we hold, as well upon general principles as upon the

authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States. . . . . . .

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Mr Justice MILLER (with whom concurred Mr. Justice HARLAN) dissenting.

Mr. Justice Harlan and myself dissent from the judgment in this case, because we think that, notwithstanding the peculiar language of the statute of New York, the tax in controversy is, in effect, a tax upon bonds of the United States held by the insurance company.

This is not the rule, however in Pennsylvania where the courts hold that a tax on a corporation based in amount on a valuation of its stock is a tax on the stock and may not be levied on that portion of the stock which is invested in United States securities exempted by law of Congress from taxation. Fox's Appeal 112 Pa. State 354. A tax on the franchise of a domestic corporation measured by the value of its patent rights where such rights were its only property, is proper. People ex rel U. S. Aluminum Printing Co. v. Knight 174 N. Y. 475, overruling People ex rel Johnson Co. v. Roberts, 159 N. Y. 70, holding to the opposite rule in the case of a corporation whose property was copyrights. A tax on the shareholders of national banks without deduction for amount of United States bonds owned by the bank is proper, Van Allen v. The Assessors, 3 Wallace 573.

PLUMMER V. COLER.

Supreme Court of the United States. October, 1899.
178 United States 115.

Joseph Plummer, a citizen and resident of New York, died October 28, 1898, leaving a last will whereby he bequeathed to Harry Plummer, his executor, forty thousand dollars in United States bonds, issued under the funding act of 1870, in trust, to hold the same during the life time of Ella Plummer Brown, daughter of the testator, and to pay the income thereof to her during her life, and at her death to divide the same between and amongst her issue then living.

The value of this life interest was computed by the appraisers at the sum of $16,120, and a tax of $161.20 was imposed thereon by the surrogate of the county of New York. From this appraisal and the order imposing the tax an appeal was taken to the Surrogate's Court of the county and State of New York.

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On December 22, 1899, the Surrogate's Court affirmed the appraisal and the order imposing a tax. Thereupon Harry Plummer, executor, appealed to the appellate division of the Supreme Court of the State of New York, which court on January 5, 1900, affirmed the order of the surrogate and the decree of the Surrogate's Court. From this decree of the appellate division of the Supreme Court an appeal was taken to the Court of Appeals of the State of New York, where, on January 8, 1900, the proceedings and order of the surrogate and the decree of the appellate division were affirmed.

In the notice of appeal to the Surrogate's Court and in that of the appeal to the Court of Appeals the grounds of appeal were stated to be the invalidity of the statute of New York purporting to impose a tax upon a transfer by legacy of bonds of the United States, and the invalidity of the statute of the State of New York and of the authority exercised thereunder by the appraiser and the surrogate, in so far as United States bonds were concerned. And the appellant specially set up and claimed a title, right, privilege and immunity under the constitution of the United States in respect to the exemption of said bonds from state taxation in any form.

Mr. Justice SHIRAS, after stating the case, delivered the opinion of the court.

In this case we are called upon to consider the question whether, under the inheritance tax laws of a State, a tax may be validly imposed on a legacy consisting of United States bonds issued under a statute declaring them to be exempt from state taxation in any form.

It is not open to question that a State cannot, in the exercise of the power of taxation, tax obligations of the United States. *Weston* v. *Charleston,* 2 Pet., 449; *Bank of Commerce* v. *New York City,* 2 Black., 620; *Home Insurance Company* v. *New York,* 134 U. S., 594, 598.

So, likewise, it is settled law that bonds issued by a State, or under its authority by its public municipal bodies, are not taxable by the United States. *Mercantile Bank* v. *New York,* 121 U. S., 138; *Pollock* v. *Farmers' Loan and Trust Co.* 157 U. S., 429, 583.

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With these concessions made, we are brought to the pivotal question in the case, and that question is thus presented in the second point discussed in the brief filed for the plaintiff in error. "If the question of the right of the State to impose the tax now in question

be considered merely with reference to the inherent lack of power of the State to impose such a tax, because of the provisions of the Constitution of the United States bearing upon that question, without any aid from the statute of the United States under which these bonds were issued, or the exemption clause contained in the bonds, we conceive it to be entirely clear that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States." Or, as stated elsewhere in the brief: "The States have no power to impose any tax or other burden which would have the effect to prevent or hinder the Government of the United States from borrowing such amounts of money as it may require for its purposes, on terms as beneficial and favorable to itself, in all respects, as it could do if no such tax were imposed by the State."

It will be observed that these propositions concede that the tax law of the State of New York in question, does not expressly, or by necessary implication, propose to tax federal securities. It is only when and if, in applying that law to the estates of decedents, such estates are found to consist wholly or partly of United States bonds, that the reasoning of the plaintiff in error, assailing the validity of the statute, can have any application. And the contention is that individuals, in forming or creating their estates, will or may be deterred from offering terms, in the purchasing of such bonds, as favorable as they otherwise might do, if they are bound to know that such portion of their estates of such bonds is to be included, equally with other property, in the assessment of an inheritance tax.

Before addressing ourselves directly to the discussion of these propositions we shall briefly review the decisions in whose light they must be determined.

And, first, what is the voice of the state courts?

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The decision of the state courts may be summarized by the statement that it is competent for the legislature of a State to impose a tax upon the franchises of the corporations of the State, and upon the estates of decedents resident therein, and in assessing such taxes and as a basis to establish the amount of such assessments, to include the entire property of such corporations and decedents, although composed, in whole or in part, of United States bonds; and that the theory upon which this can be done consistently with the Constitution and laws of the United States is that such taxes are to be regarded as imposed, not upon the prop-

erty, the amount of which is referred to as regulating the amount of the taxes, but upon franchises and privileges derived from the State.

Let us now proceed to a similar survey of the federal authorities on this subject.

Mager v. *Grima,* 8 How., 490, was a case where, by the law of Louisiana, a tax of ten per cent was imposed on legacies, when the legatee is neither a citizen of the United States nor domiciled in that State, and the executor of the deceased or other person charged with the administration of the estate was directed to pay the tax to the state treasurer. . . . . . The validity of the act was sustained by the state courts and the cause was brought to this court. The judgment of the state court was here affirmed.

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In *Van Allen* v. *The Assessors,* 3 Wall. 573, it was held that it was competent for Congress to authorize the States to tax the shares of banking associations organized under the act of June 3, 1864, without regard to the fact that a part or the whole of the capital of such association was invested in national securities declared by the statutes authorizing them to be "exempt from taxation by or under state authority." This decision has ever since been acted upon, and its authority has never been questioned by any court, and from it we learn that there is no undeviating policy that, at all times and in all circumstances, the tax systems of the States shall not extend to Federal securities.

The next cases to be noted are: *Society for Savings* v. *Coite,* 6 Wall., 594; *Provident Insurance Co.* v. *Massachusetts,* 6 Wall., 611; and *Hamilton Company* v. *Massachusetts,* 6 Wall., 632.

In these cases this court affirmed the Supreme Courts of Connecticut and Massachusetts in holding that state taxes may be imposed, the amount of which may be determined by the aggregate amount of the property or capital stock of banking and manufacturing companies, even if such property or capital stock includes United States bonds issued under a statute declaring them exempt from taxation under state authority. . . . . . .

Next worthy of notice is the case of *Home Insurance Co.* v. *New York,* 134 U. S., 594. It came here on error to the Supreme Court of the State of New York, whose judgment had been affirmed in the Court of Appeals, and was twice argued. The question considered was whether a statute of the State of New York was valid in respect to imposing a tax upon a New York corporation, measured and regulated by the amount of its annual dividends, where

those dividends were partly composed of interest of United States bonds owned by the corporation.

. . . . . In this court the question was elaborately argued, as may be seen in the first report of the case in 119 U. S., 129; and it was again contended that the case fell within the principle of public policy that the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the instrumentalities of the national government, and also that the tax in question was repugnant to the Fourteenth Amendment of the Constitution of the United States.

The reasoning of the State Court was substantially approved and their judgment, sustaining the validity of the state statute, was affirmed.

. . . .

In *United States* v. *Perkins,* 163 U. S. 625, the question was whether personal property bequeathed by will to the United States was subject to an inheritance tax under the law of the State of New York.

The facts of the case were that one William W. Merriam, a resident of the State of New York, left a last will and testament, by which he devised and bequeathed all his estate, real and personal, to the United States. The surrogate assessed an inheritance tax of $3,964.23 upon the personal property included in said bequest. Upon appeal to the general term of the Supreme Court the order of the Surrogate's Court was affirmed, and upon a further appeal to the Court of Appeals the judgment of the Supreme Court was affirmed, and the cause was brought to this court.

It was contended that, upon principle, property of the United States was not subject to State taxation; but it was held by this court, affirming the judgment of the courts below, that the tax was not open to the objection that it was an attempt to tax the property of the United States, since the tax was imposed upon the legacy before it reached the hands of the legatee; that the legacy became the property of the United States after it had suffered a diminution to the amount of the tax, and that it was only upon such a condition that the legislature assented to a bequest of it.

. . . .

One of the propositions recognized in that case applicable to the present one is that a state tax that would be invalid if imposed directly on a legacy to the United States, may be valid if the amount of the tax is taken out of the legacy before it reaches the hands of the government—the theory of such a view apparently being that the property rights of the government do not attach until

after the tax has been paid, or until the condition imposed by the tax law of the State has been complied with. Such is also the case in respect to the legacy to Ella Plummer Brown, as the statute in question distinctly makes it the duty of the executor to pay the amount of the tax before the legacy passed to the legatee.

. . . .

In closing our review of the federal decisions the case of *Wallace* v. *Myers*, 38 Fed. Rep. 184, may be properly referred to, especially as it has been cited with approval by this Court in *United States* v. *Perkins*, 163 U. S., 625, 629.

The question involved was the very one we are now considering, namely, the validity of the inheritance tax law of the State of New York when applied to a legacy consisting of United States bonds. In his opinion Circuit Judge Wallace reviewed many of the state and Federal decisions heretofore referred to, and reached the conclusion that the tax was to be regarded as imposed, not upon the bonds, but upon the privilege of acquiring property by will or inheritance, and that where the property of the decedent included United States bonds, the tax may be assessed upon the basis of their value.

We think the conclusion, fairly to be drawn from the state and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed.

Passing from the authorities, let us briefly consider some of the arguments advanced in the able and interesting brief filed in behalf of the plaintiff in error.

The propositions chiefly relied on are, first, that an inheritance tax, if assessed upon a legacy or interest composed of United States bonds, is within the very letter of the United States statute which declares that such bonds shall be "exempt from taxation in *any form* by or under state, municipal or local authority;" and, second, that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States.

But if the first proposition is sound and decisive of the question in this case, then it must follow that the cases in which this court has held that, in assessing a tax upon corporate franchises, the amount of such a tax may be based upon the entire property, or capital possessed by the corporation even when composed in whole

or in part of United States bonds, must be overruled. Plainly in those cases, as in this, there was taxation *in a form,* and in them as in this the amount of the tax was reached by including in the assessment United States bonds.

So that we return to the authorities by which it has been established that a tax upon a corporate franchise or upon the privilege of taking under the statutes of wills and of descents, is a tax not upon United States bonds if they happen to compose a part of the capital of a corporation or of a part of the property of a decedent, but upon rights and privileges created and regulated by the State.

The second proposition relied on, namely, that to permit taxation of the character we are considering would operate, as a burden upon the borrowing power of the United States, cannot be so readily disposed of. Still, we think, some observations can be made which will show that the mischief which it is claimed will follow if such statute be sustained as valid, is by no means so great or important as supposed.

And here, again, it is obvious that to affirm the second proposition will require an overruling of our previous cases. For, on principle, if a tax on inheritances, composed wholly or in part of Federal securities, would, by deterring individuals from investing therein, and, thus by lessening the demand for such securities, be regarded as therefore unlawful, it must likewise follow that, for the same reason, a tax upon corporate franchises measured by the value of the corporation's property, composed in whole or in part of United States bonds, would also be unlawful.

. . . .

It is further contended that there is a vital difference between the individual and the corporation; that the individual exists and carries on his operations under natural power and of common right, while the corporation is an artificial being, created by the State dependent upon the State for the continuance of its existence, and subject to regulation and the imposition of burdens upon it by the State, not at all applicable to natural persons.

Without undertaking to go beyond what has already been decided by this court in *Mager* v. *Grima,* 8 How. 490, in *Scholey* v. *Rew,* 23 Wall. 331; and in *United States* v. *Perkins* 163 U. S. 625, and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right, as legatee, devisee or heir, to receive the

property of his testator or ancestor, are rights derived from and regulated by the State, and we are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents. And, at all events, the mischief apprehended, of impairing the borrowing power of the government by State taxation, is the same whether that taxation be imposed upon corporate franchises or upon the privilege created and regulated by the statutes of inheritance.

. . . .

The contention of the plaintiff in error that taxation of the estates of decedents in any form however slight, is invalid, if United States bonds are included in the appraisement, seems to be unreasonable. Suppose a decedent's estate consisted wholly of United States securities, could it reasonably be claimed that the charges and expenses of administration, imposed under the laws of the state, would not be payable out of the funds of the estate? If the estate were a small one, such expenses might require the application of all the federal securities. If the estate were a large one, the expenses attendant upon administration would be proportionately large, to be raised out of the Federal securities. It is not sufficient to say that such expenses are in the nature of statutory debts, and that the question of the exemption of United States bonds cannot arise until after the debts of the estate shall have been paid. For, after all, what is an inheritance tax but a debt exacted by the State for protection afforded during the life time of the decedent? It is often impracticable to secure from living persons their fair share of contribution to maintain the administration of the State, and such laws seem intended to enable to secure payment from the estate of the citizen when his final account is settled with the State. Nor can it be readily supposed that such obligations can be evaded or defeated by the particular form in which the property of the decedent was invested.

Upon the whole, we think that the decision of the courts below was correct, and the judgment is therefore *affirmed*.

Mr. Justice WHITE dissented.

Mr. Justice PECKHAM took no part in the decision.

POLLOCK V. FARMERS' LOAN & TRUST CO.

Supreme Court of the United States. October, 1894.
157 United States 429.

Mr. Chief Justice FULLER, after stating the case, ... delivered the opinion of the court:

. . . .

The contention of the complaint is:

. . . .

Third. That the law is invalid so far as imposing a tax upon income received from state and municipal bonds.

. . . .

The averment in the bill is that the defendant company owns two millions of the municipal bonds of the city of New York, from which it derives an annual income of $60,000, and that the directors of the company intend to return and pay taxes on the income so derived.

The Constitution contemplates the independent exercise by the Nation and the State, severally, of their constitutional powers.

As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.

A municipal corporation is the representative of the State and one of the instrumentalities of the State government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *Collector* v. *Day,* 11 Wall. 113, 124; *United States* v. *Railroad Company,* 17 Wall. 322,332. In *Collector* v. *Day,* it was adjudged that Congress had no power, even by an act taxing all incomes, to levy a tax upon the salaries of judicial officers of a State, for reasons similar to those on which it had been held in *Dobbins* v. *Commissioners,* 16 Peters 435, that a State could not tax the salaries of officers of the United States. Mr. Justice Nelson, in delivering judgment, said: "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are

as independent of the general government as that government within its sphere is independent of the States."

This is quoted in *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 178, and the opinion continues: "Applying the same principles, this court, in *United States* v. *Railroad Company,* 17 Wall. 322, held that a municipal corporation within a State could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States. The revenues thus adjudged to be exempt from Federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the State, or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of a State, or of a municipal corporation, which is a political division of a State, from Federal taxation, equally require the exemption of all the property and income of the National government from State taxation."

In *Mercantile Bank* v. *New York,* 121 U. S. 138, 162, this court said: "Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues them subject to taxation for its own purposes."

The question in *Bonaparte* v. *Tax Court,* 104 U. S. 592, was whether the registered public debt of one State, exempt from taxation by that State or actually taxed there, was taxable by another State when owned by a citizen of the latter, and it was held that there was no provision of the Constitution of the United States which prohibited such taxation. The States had not covenanted that this could not be done, whereas, under the fundamental law, as to the power to borrow money, neither the United States on the one hand, nor the States on the other, can interfere with that power as possessed by each and an essential element of the sovereignty of each.

The law under consideration provides "that nothing herein contained shall apply to States, counties or municipalities." It is contended that although the property or revenues of the States or

their instrumentalities cannot be taxed, nevertheless the income derived from State, county and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation of a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in *Weston* v. *Charleston,* 2 Pet. 449, 468, where he said: "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely. . . . . . The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution." Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution.

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3. Taxation of Government Property.

VAN BROCKLIN V. STATE OF TENNESSEE.

Supreme Court of the United States. March, 1886.
117 U. S. 151.

Mr. Justice Gray, after stating the case . . . . . delivered the opinion of the court.

The question presented by this writ of error is whether lands in the State of Tennessee, which, pursuant to acts of Congress for the laying and collection of direct taxes, are sold, struck off and purchased by the United States for the amount of the tax thereon, and are afterwards sold by the United States for a larger sum, or redeemed by the former owner, are liable to be taxed, under authority of the State, while so owned by the United States.

The judgment of the Supreme Court of Tennessee rests upon the position that these lands, although lawfully purchased by the

United States, at the time of being taxed under the laws of the State, were not exempt from State taxation, because they had not been expressly ceded by the State to the United States.

We are unable to reconcile this position with a just view of the rights and powers conferred upon the national government by the Constitution of the United States.

. . . .

. . . . . The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. The power to tax involves the right to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.

. . . .

The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, "to pay the debts and provide for the common defence and general welfare of the United States." Constitution, art. 1, sect. 8, cl. 1; *Dobbins* v. *Erie County Commissioners,* 16 Pet. 435, 448. The principal reason assigned in *Buchanan* v. *Alexander,* 4 How. 20, for holding that money in the hands of a purser, due to seamen in the navy for wages, could not be attached by their creditors in a State court was, "The funds of the government are specifically appropriated to certain national objects; and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be suspended."

The more thoroughly the proceedings by which the States became members of the Union, either by joining in establishing the Federal Constitution, or by admission under subsequent acts of Congress, are examined, the more strongly they confirm the same view.

. . . .

It cannot be doubted that the provisions which speak of the

exemption of property of the United States from taxation, in the various acts of Congress admitting States into the Union, are equivalent to each other; and that, like the other provision, which often accompanies them, that the State "shall not interfere with the primary disposal of the soil by the United States," they are but declaratory, and confer no new right or power upon the United States.

. . . .

. . . . . The necessary exemption of all property of the United States from State taxation has been recognized by the highest courts of Illinois, California and Kansas . . . . ; and by those of Virginia, Connecticut, Iowa and Wisconsin. *Western Union Telegraph Co.* v. *Richmond,* 26 Grattan 1, 30; *Andrew* v. *Auditor,* 28 Grattan 115, 124; *West Hartford* v. *Water Commissioners,* 44 Conn. 360, 368; *Chicago, Rock Island & Pacific R. R.* v. *Davenport,* 51 Iowa 451, 454; *Wisconsin Central R. R.* v. *Taylor County,* 52 Wis. 37, 51, 52.

The legislatures of most of the States have affirmed the same principle, by inserting in their general tax acts an exemption of property belonging to the United States.

. . . .

In short, under a republican form of government, the whole property of the State is owned and held by the State for public uses, and is not taxable, unless the State which owns and holds it for those uses clearly enacts that it shall share the burden of taxation with other property within its jurisdiction. Whether the property of one of the States of the Union is taxable under the laws of that State depends upon the intention of that State as manifested by those laws. But whether the property of the United States shall be taxed under the laws of a State depends upon the will of its owner, the United States, and no State can tax the property of the United States without their consent.

. . . .

The liability of the property of the Pacific Railroad Companies to state taxation has been upheld, on the distinction stated in *M'Cullough* v. *Maryland,* 4 Wheat. 436, and in *Osborn* v. *Bank of the United States,* 9 Wheat. 867, already cited, and reasserted in *National Bank* v. *Commonwealth,* 9 Wall. 353, 362, namely, that although the railroad corporations were agents of the United States, the property taxed was not the property of the United States, but the property of the agents, and a State might tax the property of the agents provided it did not tax the means employed by

the national government. *Thomson* v. *Pacific Railroad,* 9 Wall. 579; *Railroad Co.* v. *Peniston,* 18 Wall. 5. In *Railroad Co.* v. *Peniston,* Mr. Justice Strong, who delivered the principal opinion, dwelt upon the consideration, that the property taxed was not owned by the United States, as essential to support the validity of the tax. 18 Wall. 32, 34. And Mr. Justice Bradley, in a dissenting opinion in which Mr. Justice Field joined, said: "The states cannot tax the powers, the operations, or the property of the United States, nor the means which it employs to carry its powers into execution." 18 Wall. 41.

The cases in which this court has held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State have a direct and important bearing upon the question before us.

. . . .

The United States acquired the title to all the land now in question under the express authority of acts of Congress, and by proceedings the validity of which is clearly established by a series of decisions of this court. Acts of June 7, 1862, ch. 98, § 7, 12 Stat. 423; June 8, 1872, ch. 337, § 4, 17 Stat. 331; and February 8. 1875, ch. 36, § 26, 18 Stat. 313; *Bennett* v. *Hunter,* 9 Wall. 326; *De Treville* v. *Smalls,* 98, U. S. 517; *Keely* v. *Sanders,* 99 U. S. 441; *United States* v. *Taylor,* 104 U. S. 216; *United States* v. *Lawton,* 110 U. S. 146. The imposition of direct taxes upon the land by those acts of Congress was a lawful exercise of the power conferred by the Constitution to lay and collect taxes. The provisions authorizing the United States to sell the land for non-payment of the taxes assessed thereon, and to purchase the land for the amount of the taxes if no one would bid a higher price, were necessary and proper means for carrying into effect the power to lay and collect the taxes; and so were the provisions authorizing the United States afterwards to sell the land, to apply the proceeds to the payment of taxes, and to hold any surplus for the benefit of the former owner. While the United States owned the land struck off to them for the amount of the taxes because no one would pay more for it, and until it was sold by the United States for a greater price, or was redeemed by the former owner, the United States held the entire title as security for the payment of the taxes; and it could not be known how much, if anything, beyond the amount of the taxes, the land was worth. To allow land, lawfully held by the United States as security for the payment of taxes assessed by and due to them, to be assessed and sold for State

taxes, would tend to create a conflict between the officers of the two governments, to deprive the United States of a title lawfully acquired under express acts of Congress, and to defeat the exercise of the constitutional power to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States.

The question whether the taxes laid under authority of the State can be collected in this suit depends upon the question whether they were lawfully assessed. But all the assessments were unlawful, because made while the land was owned by the United States. The assessments, being unlawful, created no lien upon the land. Those taxes, therefore, cannot be collected, even since the plaintiffs in error have redeemed or purchased the land from the United States.

Whether the Supreme court of Tennessee rightly construed the provisions of the Constitution and statutes of the State as not exempting from taxation lands belonging to the United States, exclusive jurisdiction over which had not been ceded by the State, is quite immaterial, because, for the reasons and upon the authorities above stated, this court is of opinion that neither the people nor the legislature of Tennessee had power, by constitution or statute, to tax the land in question, so long as the title remained in the United States.

States may impose a tax on a bequest to the United States. United States v. Perkins, 163 U. S. 625.

UNITED STATES V. BALTIMORE AND OHIO RAILROAD COMPANY.

Supreme Court of the United States. December, 1872.
17 Wallace, 322.

The legislature of Maryland gave to the city of Baltimore (then desirous of aiding the Baltimore and Ohio Railroad Company in the construction of its road, which the city councils of Baltimore conceived would, if made, greatly benefit the city), authority to issue and sell its bonds to the extent of $5,000,000, payable in 1890; and to lend the proceeds to the railroad company, less 10 per cent, to be reserved as a sinking fund to pay the principal of the loan at its maturity. This the city did, the railroad company in turn giving to it a mortgage on all its road, revenue and fran-

chises, to secure the payment of the bonds which the city had issued, and the interest which it had bound itself to pay.

After the passage of the internal revenue laws, ... the government claimed payment from the company of a tax of 5 per cent, which the collectors of the Federal revenue alleged that under the plain language of the . . . . . 122nd section, the company was bound to withhold from the city and pay to the United States. The company refused so to pay the 5 per cent to the government on the ground that the tax was not a tax laid on *it*, the company, but one laid on their creditor, the city of Baltimore, and that that city, being a municipal corporation, could not have its revenues taxed by the Federal government.

The United States accordingly sued the company, in the court below, in assumpsit.

. . . .

Mr. Justice Hunt delivered the opinion of the court.

The defendants insist, firstly, that the section in question does not lay a tax upon the corporations therein named, and by whom the tax is payable, upon their own account, but uses them as a convenient means of collecting the tax from the creditor, or stockholder, upon whom the tax is really laid. They insist as a consequence, secondly, that the present is a tax upon the revenues of the city of Baltimore; and, thirdly, that it is not within the power of Congress to tax the income or property of a municipal corporation.

. . . .

In the case before us, this question controls its decision. If the tax were upon the railroad, there is no defence. It must be paid. But we hold that the tax imposed by the 122d section is in substance and in law a tax upon the income of the creditor or stockholder, and not a tax upon the corporation.

The creditor here is the city of Baltimore, and the question then arises whether this tax can be collected from the revenues of that municipal corporation.

There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its or-

ganization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other.

. . . .

A municipal corporation like the city of Baltimore, is a representative not only of the state, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state.

. . . .

Let us look at the facts of the case before us. The city of Baltimore, with a view to its commercial prosperity, was desirous of aiding in the construction of a railroad, by which the commerce and business of the Western States would be brought to that city. For this purpose it was authorized by the legislature to issue its corporate bonds for $5,000,000, on which it was to obtain the money. The proceeds of these bonds, reserving 10 per cent as a sinking fund, were to be paid to the railroad company. To secure the city against loss and to provide for the payment of interest on the bonds of the city as it should, from time to time, mature, and of the principal when payable, the railroad company were to execute a mortgage to the city upon its road and franchise and revenues. All this was done as agreed upon. The interest secured by this mortgage, has, from time to time, been paid by the railroad company to the city, and it is a tax (under the 122d section before referred to) upon the interest thus paid, that the plaintiff now seeks to recover.

That the State possessed the power to confer this authority upon the city we see no reason to doubt.

Was it exercised for the benefit of the municipality, that is, in the course of its municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the city of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power? The legislature and the authorities of the city of Baltimore decided that the investment of $5,000,000 in the aid of the construction of a railroad, which should bring to that city the unbounded harvests of the West, would be a measure for the benefit of the inhabitants of Baltimore and of the municipality. This vast business was a prize for which the States

north of Maryland were contending. Should it endeavor by the expenditure of this money or this credit to bring this vast business into its own State, and make its commercial metropolis great and prosperous, or should it refuse to incur hazard, allow other States to absorb this commerce, and Baltimore to fall into an inferior position? This was a question for the decision of the city under the authority of the State. It was a question to be decided solely with reference to public and municipal interests. The city had authority to spend its money in opening squares, in widening streets, in deepening rivers, in building common roads or railways. The State could do these things by the direct act of its legislature, or it could empower the city to do them. It could act directly or through the agency of others. It is not a question to be here discussed, whether the action proposed would in the end result to the benefit of the city. It might be wise or it might prove otherwise. The city was to reap the fruits in the advanced prosperity of all its material interests, if successful. If unsuccessful, the city was to bear the load of debt and taxation, which would surely follow. The city had the power given it by the legislature to decide the question. It was within the scope of its municipal powers.

. . . .

We admit the proposition of the counsel, that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual were to make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not in that action be an auxiliary or servant of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position. It is not necessary, however, to speculate upon hypothetical cases. We are clear in the opinion that the present transaction is within the range of the municipal duties of the city, and that the tax cannot be collected.

Mr. Justice Clifford and Mr. Justice Miller dissenting.

II. Taxes on Commerce.

1. *State Taxation of Interstate and Foreign Commerce.*

ROBBINS V. SHELBY COUNTY TAXING DISTRICT.

Supreme Court of the United States. March, 1887.
120 United States, 489.

This was an information in a state court of Tennessee, against the plaintiff in error, for doing business in the Taxing District of Shelby County in that State, as a drummer on behalf of a firm doing business in Cincinnati, Ohio, without a license as required by the provision of the statute of Tennessee, which is set out in the opinion of the court. The defendant was found guilty, and this judgment was affirmed by the Supreme Court of the state on appeal. 13 Lea 303. The defendant sued out this writ of error. The cause was submitted at the last term of court. The court, on the 8th of March, 1886, ordered it argued; and the argument was heard accordingly at this term. The case is stated in the opinion of the court.

Mr. Justice Bradley delivered the opinion of the court.

This case originated in the following manner: Sabine Robbins, the plaintiff in error, in February, 1884, was engaged at the city of Memphis, in the State of Tennessee, in soliciting the sales of goods for the firm of Rose, Robbins & Co., of Cincinnati, in the State of Ohio, dealers in paper, and other articles of stationery, and exhibited samples for the purpose of effecting such sales,—an employment usually denominated as that of a "drummer." There was in force at that time a statute of Tennessee, relating to the subject of taxation in the Taxing Districts of the State, applicable, however, only to the Taxing Districts of Shelby County, (formerly the city of Memphis,) by which it was enacted, amongst other things, that "All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege, and no license shall be issued for a longer period than three months." Stats. Tennessee, 1881, c. 96, § 16.

The business of selling by sample and nearly sixty other occupations had been by law declared to be privileges, and were taxed as such, and it was made a misdemeanor, punishable by a fine of not less than five, nor more than fifty dollars, to exercise any of such

occupations without having first paid the tax or obtained the license required therefor.

Under this law, Robbins, who had not paid the tax nor taken a license, was prosecuted, convicted and sentenced to pay a fine of ten dollars, together with the state and county tax, and costs; and on appeal to the Supreme Court of the State, the judgment was affirmed. This writ of error is brought to review the judgment of the Supreme Court, on the ground that the law imposing the tax was repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several states.

. . . .

The principal question argued before the Supreme Court of Tennessee was, as to the constitutionality of the act which imposed the tax on drummers; and the court decided that it was constitutional and valid.

That is the question before us, and it is one of great importance to the people of the United States, both as it represents their business interests and their constitutional rights. It is presented in a nutshell, and does not, at this day, require for its solution any great elaboration of argument or review of authorities. Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following:

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit of one uniform system, or plan of regulation. This was decided in the case of *Cooley* v. *Board of Wardens of the Port of Philadelphia,* 12 How. 299, 319, and was virtually involved in the case of *Gibbons* v. *Ogden,* 9 Wheat. 1, and has been confirmed in many subsequent cases, amongst others, in *Brown* v. *Maryland,* 12 Wheat. 419; *The Passenger Cases,* 7 How. 283; *Crandall* v. *Nevada,* 6 Wall. 35, 42; *Ward* v. *Maryland,* 12 Wall. 418, 430; *State Freight Tax Cases,* 15 Wall. 232, 279; *Henderson* v. *Mayor of New York,* 92 U. S. 259, 272; *Railroad Co.* v. *Husen,* 95 U. S. 465, 469; *Mobile* v. *Kimball,* 102 U. S. 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 203; *Wabash, &c., Railway Co.* v. *Illinois,* 118 U. S. 557.

2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to

make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons* v. *Ogden,* 9 Wheat. 1, 222, by Mr. Justice Grier in the *Passenger Cases,* 7 How. 283, 462, and has been affirmed in subsequent cases. *State Freight Tax Cases,* 15 Wall. 232, 279; *Railroad Co.* v. *Husen,* 95 U. S. 465, 469; *Welton* v. *Missouri,* 91 U. S. 275, 282; *Mobile* v. *Kimball,* 102 U. S. 691, 697; *Brown* v. *Houston,* 114 U. S. 622, 631; *Walling* v. *Michigan,* 116 U. S. 446, 455; *Pickard* v. *Pullman Southern Car Co.,* 117 U. S. 34; *Wabash, &c., Railway Co.* v. *Illinois,* 118 U. S. 557.

3. It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject.

For authorities on this last head it is only necessary to refer to those already cited.

In a word it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge upon the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State, to sell his goods in another State, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them?

. . . .

The truth is, that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by exhibition of samples. If the right exists, any New York or Chicago merchant visiting New Orleans or Jacksonville, for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts.

But it will be said that a denial of this power of taxation will interfere with the right of the State to tax business pursuits and callings carried on within its limits, and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in

which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the State legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a State privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual States, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them.

To deny to the State the power to lay the tax, or require the license in question, will not, in any perceptible degree, diminish its resources or its just power of taxation. It is very true, that if the goods when sold were in the State, and part of its general mass of property, they would be liable to taxation; but when brought into the State in consequence of the sale they will be equally liable; so that, in the end, the State will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the State and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown* v. *Houston,* 114 U. S. 622. When goods are sent from one State to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them *as* goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. *Brown* v. *Houston, qua supra*; *Machine Co.* v. *Gage,* 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing and seems to us clearly a tax on interstate commerce itself.

It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drum-

mers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax,* 15 Wall. 232. The negotiation of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone.

. . . .

To say that the tax, if invalid as against drummers from other States, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the State is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other States, it acts of its own free will, and is itself the author of such discrimination. As before said, the State may tax its own internal commerce; but that does not give it any right to tax interstate commerce.

The judgment of the Supreme Court of Tennessee is reversed and the plaintiff in error must be discharged.

Mr. Chief Justice WAITE with whom concurred Mr. Justice FIELD and Mr. Justice GRAY, dissenting.

CASE OF THE STATE FREIGHT TAX.

Supreme Court of the United States. December, 1872.
15 Wallace 232.

Mr. Justice STRONG delivered the opinion of the court.

We are called upon, in this case, to review a judgment of the Supreme Court of Pennsylvania, affirming the validity of a statute of the State, which the plaintiffs in error allege to be repugnant to the Federal Constitution.

The case presents the question whether the statute in question,—so far as it imposes a tax upon freight taken up within the State and carried out of it, or taken up outside the State and delivered within it, or, in different words, upon all freight other than that

taken up and delivered within the State,—is not repugnant to the provision of the Constitution of the United States which ordains that "Congress shall have power to regulate commerce with foreign nations and among the several States," or in conflict with the provision that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

. . . .

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality, or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid.

. . . .

Upon what, then is the tax imposed by the act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary it is expressly laid upon the freight carried. The companies are required to pay to the State treasurer for the use of the Commonwealth "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides "where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof," no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The State treasurer is to decide which of several shall pay the whole.

. . . .

Considering it, then, as manifest that the tax demanded by the

act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the act is a regulation of interstate commerce. Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the States. In his work on the Constitution (§ 1057), Judge Story asserts that the sense in which the word commerce is used in that instrument includes not only traffic, but intercourse and navigation. And in the *Passenger Cases* (7 Howard, 416) it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted.

Then, why is not a tax upon freight transported from State to State a regulation of interstate transportation, and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State and in taking them out? The present case is the best possible illustration. The Legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the

prosecution of this branch of commerce, and as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines. It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or leave the State upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other State, may be placed upon a canal, railroad or steamboat within the State for transportation any distance, either into or out of the State, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State any the less a regulation of transportation, because the same rule may be applied to carriage which is wholly internal. Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State.

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If, then, this is a tax upon freight carried between States, and a tax because of its transportation, and if such a tax is in effect a reg-

ulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States. It is not necessary to the present case to go into the much debated question whether the power given to Congress by the Constitution to regulate commerce among the States is exclusive.

. . . .

However this may be, the rule has been asserted with great clearness, that whenever the subjects over which the power to regulate commerce is asserted are in their nature national or admit of one uniform system, or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. (*Cooley* v. *Port Wardens,* 12 Howard 299; *Gilman* v. *Philadelphia, supra*; *Crandall* v. *The State of Nevada,* 6 Wallace 42.)

Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of Western States may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassment, no doubt, that the power of regulating commerce among the States was conferred upon the federal government.

In *Almy* v. *The State of California* (24 How. 169), it was held by this court that a law of the State, imposing a tax upon bills of lading for gold or silver transported from that State to any port or place without the State, was substantially a tax upon the transportation itself, and was therefore unconstitutional. True, the decision was rested on the ground that it was a tax upon exports, and subsequently, in *Woodruff* v. *Parham* (8 Wall. 123), the court denied the correctness of the reasons given for the decision; but they said at the same time the case was well decided for another reason, viz., that such a tax was a regulation of commerce—a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall* v. *Nevada* (6 Wall. 35), and with the authority of Congress to regulate commerce among the States.

In *Crandall* v. *The State of Nevada,* where it appeared that the

legislature of the State had enacted that there should "be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage-coach or other vehicle engaged or employed in the business of transporting passengers for hire," and required the proprietors, owners, and corporations so engaged to make monthly reports of the number of persons carried, and to pay the tax, it was ruled that though required to be paid by the carriers, the tax was a tax upon passengers, for the privilege of being carried out of the State, and not a tax on the business of carriers. For that reason it was held that the law imposing it was invalid, as in conflict with the Constitution of the United States. A majority of the court, it is true, declined to rest the decision upon the ground that the tax was a regulation of interstate commerce, and therefore beyond the power of the State to impose, but all the judges agreed that the State law was unconstitutional and void. The Chief Justice and Mr. Justice Clifford thought the judgment should have been placed exclusively on the ground that the act of the State legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several States, and it does not appear that the other judges held that it was not thus inconsistent. In any view of the case, however, it decides that a State cannot tax persons for passing through or out of it. Interstate transportation of passengers is beyond the reach of the State legislature. And if State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers is unconstitutional *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State, in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transportation from State to State, or upon the transporter because of such transportation.

But while holding this, we recognize fully the power of each State to tax at its discretion its own internal commerce, and the franchises, property or business of its own corporations, so that interstate intercourse, trade or commerce be not embarrassed or restricted. That must remain free.

The conclusion of the whole is that, in our opinion, the act of the legislature of Pennsylvania of August 25th, 1864, so far as it applies to articles carried through the State, or articles taken up in

the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void.

Judgment reversed, and the record is remitted for further proceedings.

Mr. Justice Swayne (with whom concurred Mr. Justice Davis), dissenting.

I dissent from the opinion just read. In my judgment the tax is imposed upon *the business* of those required to pay it. The tonnage is only the mode of ascertaining the extent of the business. That no discrimination is made between freight carried wholly within the State, and that brought into or carried through or out of it, sets this, as I think, in a clear light, and is conclusive on the subject.

LELOUP V. PORT OF MOBILE.

Supreme Court of the United States. October, 1887.
127 United States, 640.

Mr. Justice Bradley delivered the opinion of the court.

This was an action brought in the Mobile Circuit Court, in the State of Alabama, by the Port of Mobile, a municipal corporation, against Edward Leloup, agent of the Western Union Telegraph Company, to recover a penalty imposed upon him for the violation of an ordinance of said corporation, adopted in pursuance of the powers given to it by the legislature of Alabama, and in force in August, 1883.

. . . .

In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the State, county and port of Mobile, on its poles, wires, fixtures and other property, at the same rate and to the same extent as other corporations and individuals were required to do. Besides the tax on tangible property, they were also required to pay a tax of three-quarters of one per cent on their gross receipts within the State.

The question is squarely presented to us, therefore, whether a

State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress passed July 24th, 1866, and other acts incorporated in Title LXV. of the Revised Statutes? Can a State prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.

Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business.

Now, we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different States, it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and free from the control of State regulations, except such as are strictly of a police character. In the case of *The Pensacola Telegraph Co.* v. *The Western Union Telegraph Co.*, 96 U. S. 1, we held that it was not only the right, but the duty of Congress to take care that intercourse among the States and the transmission of intelligence between them be not obstructed or unnecessarily encumbered by State legislation; and that the act of Congress, passed July 24th, 1866, above referred to, so far as it declares that the erection of telegraph lines shall, as against State interference, be free to all who accept its terms and conditions, and that a telegraph company of one State shall not, after accepting them, be excluded by another State from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the States, and is also appropriate legislation to execute the powers of Congress over the postal service. In *Western Union Telegraph Company* v. *Texas,* 105 U. S. 460, we decided that a State cannot lay a tax on the interstate business of a telegraph company, as it is interstate commerce, and that if the company accepts the provisions of the act of 1866, it becomes an agent of the United States, so far as the business of the government is concerned; and State laws are uncon-

stitutional which impose a tax on messages sent in the service of the government, or sent by any persons from one State to another. In the present case, it is true, the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages.

It comes plainly within the principles of the decisions recently made by this court in *Robbins* v. *The Taxing District of Shelby County,* 120 U. S. 489 and *Philadelphia and Southern Steamship Co.* v. *Pennsylvania,* 122 U. S. 326.

It is parallel with the case of *Brown* v. *Maryland,* 12 Wheat. 419. That was a tax on an occupation and this court held that it was equivalent to a tax on the business carried on,—(the importation of goods from foreign countries),—and even equivalent to a tax on the imports themselves, and therefore contrary to the clause of the Constitution which prohibits the States from laying any duty on imports. The Maryland act which was under consideration in that case declared that "all importers of foreign articles or commodities, etc., and all other persons selling the same by wholesale, etc., shall before they are authorized to sell, take out a license, ... for which they shall pay fifty dollars," etc., subject to a penalty for neglect and refusal. Chief Justice Taney, referring to the case of *Brown* v. *Maryland* in *Almy* v. *State of California,* 24 How. 169, 173, in which it was decided that a State stamp tax on bills of lading was void, said: "We think this case cannot be distinguished from that of *Brown* v. *Maryland.* That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution now in question. . . . . The opinion of the court, delivered by Chief Justice Marshall, shows that it [the case] was carefully and fully considered by the court. And the court decided that the State law [the Maryland law under consideration in *Brown* v. *Maryland,*] was a tax on imports, and the mode of imposing it by giving it the form of a tax on the occupation of the importer, merely varied the form in which the tax was imposed, without varying the substance."

But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company.

The state court relies upon the case of *Osborn* v. *Mobile,* 16

Wall. 479, which brought up for consideration an ordinance of the city, requiring every express company, or railroad company doing business in that city, and having a business extending beyond the limits of the State, to pay an annual license of $500; if the business was confined within the limits of the State, the license fee was only $100; if confined within the city it was $50; subject in each case to a penalty for neglect or refusal to pay the charge. This court held that the ordinance was not unconstitutional. This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States.

A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts.

In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary.

. . . .

We may here repeat, what we have so often said before, that this exemption of interstate and foreign commerce from state regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage,

pilotage, and the like. We have recently had before us the question of taxing the property of a telegraph company, in the case of *Western Union Telegraph Company* v. *Massachusetts,* 125 U. S. 530.

The result of the conclusion which we have reached is, that the judgment of the Supreme Court of Alabama must be *Reversed, and the cause remanded with instructions to reverse the judgment of the Mobile Circuit Court; and it is so ordered.*

PICKARD V. PULLMAN SOUTHERN CAR CO.

Supreme Court of the United States. October, 1885.
117 United States, 34.

Mr. Justice Blatchford delivered the opinion of the court. After stating the Case . . . . . he continued:

The point upon which the final judgment was rendered in the case was the one considered and adjudged in the decision given on the demurrer to the declaration. The tax was not a property tax, because, under the Constitution of Tennessee, all property must be taxed according to its value, and this tax was not measured by value, but was an arbitrary charge. What was done by the plaintiff was taxed as a privilege, it being assumed by the State authorities that the Legislature had the power, under the Constitution of Tennessee, to enact the 6th section of the act of 1877, and that the plaintiff had done what that section declared to be a privilege. By the decisions of the Supreme Court of Tennessee, cited in the opinion of the Circuit Court on the demurrer, it is held, that the Legislature may declare the right to carry on any business or occupation to be a privilege, to be purchased from the State on such conditions as the statute law may prescribe, and that it is illegal to carry on such business without complying with those conditions. In this case the payment of the tax imposed was a condition prescribed, without complying with which what was done by the plaintiff was made illegal. The tax was imposed as a condition precedent to the right of the plaintiff to run and use the thirty-six sleeping cars owned by it, as it ran and used them on railroads in Tennessee. The privilege tax is held by the Supreme Court of Tennessee to be a license tax, for the privilege of doing the thing for which the tax is imposed, it being unlawful to do the thing without paying the tax. What was done by the plaintiff in this case, in connection with

the use of the thirty-six cars, if wholly a branch of inter-State commerce, was made by the State of Tennessee unlawful unless the tax should be paid, and to the extent of the tax, a burden was placed on such commerce; and, upon principle, the tax, if lawful, might equally well have been large enough to practically stop altogether the particular species of commerce.

What was that commerce? The plaintiff, by its contracts, furnished sleeping cars to the railroad company, to be used by the latter "for the transportation of passengers," sufficient in numbers to meet the requirements of travel on the road. . . . . . The plaintiff collected from every person occupying the car compensation for its accommodations in seats and couches. The railroad company permitted the plaintiff to place its tickets for seats and couches on sale in the ticket offices of the railroad company, the sale to be a part of the general duties of the ticket agents of the latter, and to be without charge to the plaintiff, but the proceeds of sales to be at its risk. . . . . .

On these facts, the cars in question were cars for the transportation of the passengers who occupied them, in their transit into, or through, or out of Tennessee. They were used by the railroad company for such transportation, and it received the transit fare or compensation. . . . . .

The tax was a unit, for the privilege of the transit of the passenger and all its accessories. No distinction was made in the tax between the right of transit, as a branch of commerce between the States, and the sleeping and other conveniences which appertained to a transit in the car. The tax was really one on the right of transit, though laid wholly on the owner of the car. So, too, the service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special convenience or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it was engaged in inter-State commerce, was not taxable by the state of Tennessee; because the plaintiff had no domicil in Tennessee, and was not subject to its jurisdiction for purposes of taxation; and the cars had no *situs* within the state for purposes of taxation; and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege. . . . .

The fare paid by the inter-State passenger to the railroad company, and that paid to the plaintiff, added together, were merely a

217 U.S. 91
Crutcher vs Ken. 141 U.S. 147 —

charge for his convenience in a particular way, and there was really but one charge for the transit, though the total amount paid was divided among two recipients. The service was a single one, of inter-State transit, with certain accommodations for comfort, and what was paid to the plaintiff was part of a charge for the conveyance of the passenger.

The views above expressed are in harmony with numerous decisions which have been made by this court on the subject to which they relate.

. . . .

The question involved in this case was before the court of chancery of Tennessee in *Pullman Southern Car Co* v. *Gaines,* 3 Tenn. Ch. 587, on the same facts, as to the privilege tax for 1877. That court held (and it is stated that the Supreme Court of Tennessee, on appeal, affirmed its ruling), that this privilege tax, as to such of the cars as passed and repassed through the State, and did not abide in it, was not amenable to the objection that it interfered with inter-State commerce. The view taken was that the property of the foreign corporation, used in Tennessee, could be taxed as property or by an excise on its use; and that the tax in this case was not directly on the object of commerce, or directly aimed at commerce. We have given to the views set forth by the Tennessee Chancery Court the consideration due to the judgments of that tribunal, but are unable to concur in its conclusion.

Judgment affirmed.

See Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, *infra,* which limits the application of the principal case.

OSBORNE V. FLORIDA.

Supreme Court of the United States. October, 1896.
164 United States, 650.

Mr. Justice PECKHAM, after stating the case, delivered the opinion of the court.

The criminal proceedings against the plaintiff in error were taken by virtue of a statute of Florida, known as chapter 4115, approved June 2, 1893. The ninth section of that chapter provides that: "No person shall engage in or manage the business, profession or occupation mentioned in this section, unless a state license shall have been procured from the tax collector. . . . . .

The twelfth subdivision provides, among other things, that "all express companies doing business in this state shall pay . . . . a license tax . . . . . Any express company violating this provision, and any person that knowingly acts as agent for any express company before it has paid the above tax, payable by such company, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars, or confined in the county jail not less than six months."

In addition to the criminal penalty above set forth, section 10 provides that the payment of all licenses taxed may be enforced by the seizure and sale of property by the collector.

The plaintiff in error assigns two grounds upon which he seeks for a reversal of the judgment of the state court. One is based upon the allegation that the statute, so far as regards the Southern Express Company or himself as its agent, violates the commerce clause of the Federal Constitution, in that it assumes to regulate interstate commerce. . . . .

It may be here assumed that if the statute applied to the express company in relation to its interstate business, it would be void as an attempted interference with or regulation of interstate commerce.

The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own State. *Leffingwell* v. *Warren,* 2 Black. 599; *People* v. *Weaver,* 100 U. S., 539, 541; *Noble* v. *Mitchell,* 164 U. S. 367, 372, and cases there cited.

The Supreme Court of Florida has construed the ninth section of this act and has held in express terms that it does not apply to or affect in any manner the business of this company which is interstate in its character; that it applies to and affects only its business which is done within the State, or is, as it is termed, "local" in its character, and it has held that under the statute so long as the express company confines its operations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question. It has added, however, that under the provisions of the statute, if the company engage in business within the State of a local nature as distinguished from an interstate or foreign kind of commerce, it becomes subject to the statute so far only as concerns its local business, notwithstanding it may at the same time engage in interstate or foreign commerce. In other words, this statute as construed by the Supreme Court of Florida

does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in its character, and that as to the latter kind of business the statute does not apply to or affect it. As thus construed, we have no doubt as to the correctness of the decision that the act does not in any manner violate the Federal Constitution.

The case of *Crutcher* v. *Kentucky*, 141 U. S., 47, is not in the slightest degree opposed to this view. The act which was held to
6 US be in violation of the Federal Constitution in that case prohibited
104. the agent of a foreign express company from carrying on business at all in that State without first obtaining a license from the State. The company was thus prevented from doing any business, even of an interstate character, without obtaining the license in question. The act was held to be a regulation of interstate commerce in its application to corporations or associations engaged in that business, and that subject was held to belong exclusively to national and not state legislation.

It has never been held, however, that when the business of the company, which is wholly within the State, is but a mere incident of its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon, the business of the company which is interstate, there is no interference with that commerce by the state statute. It was stated by Mr. Justice Bradley, in the course of his opinion in the *Crutcher case*, that: "Taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection," viz.: an objection that the tax or license was a regulation of or that it improperly affected interstate commerce. We have no doubt that this is a correct statement of the law in that regard. The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax. It was said as to those cases that the law made the payment of the fee or the obtaining of the license a condition of the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and, therefore, void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its inter-

state business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State.

The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid.

. . . .

Upon the construction given it by the state court the statute does not violate any provision of the Federal Constitution, and the judgment of that court is, therefore,

Affirmed.

BROWN V. HOUSTON.

Supreme Court of the United States. October, 1884.
114 United States, 622.

This was a suit in the nature of a bill in equity to restrain the defendants, who were defendants in error here, from collecting a tax, imposed upon personal property by the authorities of the State of Louisiana. The facts which make the case are stated in the opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

This suit was brought by the plaintiffs in error in the Civil District Court for the Parish of Orleans, State of Louisiana, 30th December, 1880, to enjoin the defendant, Houston, from seizing and selling a certain lot of coal belonging to the plaintiffs, situated in New Orleans. They alleged in their petition that they were residents and did business in Pittsburg, State of Pennsylvania; that Houston, State tax collector of the upper District of the Parish of Orleans, had officially notified Brown & Jones, the agents of the plaintiffs in New Orleans, that they (Brown & Jones) were indebted to the State of Louisiana in the sum of \$352.80; state tax for the year 1880 upon a certain lot of Pittsburg coal assessed as their property, and valued at \$58,800; that they (Brown & Jones) were delinquents for said tax, and that he, said tax collector, was about to seize, advertise and sell said coal to pay said tax, as would appear by a copy of the notice annexed to the petition. The plaintiffs alleged that they were not indebted to the State of Louisiana for said tax; that they were the sole owners of the coal, and were not liable for any tax thereon, having paid all taxes legally due for

the year 1880 on said coal in Pennsylvania; and that the said coal was simply under the care of Brown & Jones as the agents of the plaintiffs in New Orleans, for sale. They further alleged that said coal was mined in Pennsylvania, and was exported from said State and imported into the State of Louisiana as their property, and was then (at the time of the petition), and had always remained, in its original condition, and never had been or become mixed or incorporated with other property in the State of Louisiana.

That when said assessment was made, the said coal was afloat in the Mississippi river in the Parish of Orleans, in the original condition in which it was exported from Pennsylvania, and the agents, Brown & Jones, notified the board of assessors of the parish that the coal did not belong to them, but to the plaintiffs, and was held as before stated, and was not subject to taxation, and protested against the assessment for that purpose. The plaintiffs averred that the assessment of the tax and any attempt to collect the same were illegal and oppressive, and contrary to the Constitution of the United States, Article 1, Section 8, paragraphs 1 and 3, and Section 10, paragraph 2; and therefore prayed an injunction to prevent the seizure and sale of the coal, which, upon giving the requisite bond, was granted.

. . . .

The defendant answered with a general denial, but admitting the assessment of the tax and the intention to sell the property for payment thereof.

. . . .

Upon the case as thus made the District Court of the parish dissolved the injunction and dismissed the suit. On appeal to the Supreme Court of Louisiana, the judgment was affirmed, and the case is now here by writ of error to the judgment of the Supreme Court.

The following errors have been assigned:

"The lower court erred in holding:

"1st. That the tax in question did not violate Article 4, Section 2, Clause 1, of the Federal Constitution.

"2d. That it did not violate Article 1, Section 8, Clause 3, of the same instrument.

"3d. That it did not violate Article 1, Section 10, Clause 2, of the same instrument.

The clauses here referred to are these:

1. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

2. "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

3. "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

. . . .

It was decided by this court in the case of *Woodruff* v. *Parham*, 8 Wall. 123, that the term "imports" as used in that clause of the Constitution which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," does not refer to articles carried from one State into another, but only to articles imported from foreign countries into the United States.

. . . .

The other assumption made under that assignment, that some of the coal was afterwards exported, and that the tax complained of was therefore *pro tanto* a duty on exports, is equally untenable. When the petition was filed the coal was lying in New Orleans, in the hands of Brown & Jones, for sale. The petition states this in so many words, and Rootes testifies the same thing, and adds that it was to be sold by the flat-boat load. He also adds that at the time of his examination more than half of it had been exported to foreign countries; but he probably means that it had been sold to steamers sailing to foreign ports for use on the same, and had only been exported in that way. The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans, and held there on sale, without reference to the destination or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar. If after this, and after being sold, the purchaser thought proper to put it on board of a steamer bound to foreign parts, that did not alter the character of the taxation so as to convert it from a general tax to a duty on exports. When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike,

it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards. This is the most that can be said of the goods in question, and we are, therefore, of opinion that the tax was not a duty on exports any more than it was a duty on imports, within the meaning of those terms in the clause under consideration.

But in holding, with the decision in *Woodruff* v. *Parham,* that goods carried from one State to another are not imports or exports within the meaning of the clause which prohibits a State from laying any impost or duty on imports or exports, we do not mean to be understood as holding that a State may levy import or export duties on goods imported from or exported to another State. We only mean to say that the clause in question does not prohibit it. Whether the laying of such duties by a State would not violate some other provision of the Constitution, that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes, is a different question. This brings us to the consideration of the second assignment of error, which is founded on the clause referred to.

The power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power; if, in the absence of congressional action, the States may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still, according to the rule laid down in *Cooley* v. *Board of Wardens of Philadelphia,* 12 How. 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and where no regulation is imposed by the grovernment which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that

that commerce shall be free and untrammelled; and any regulation of the subject by the States is repugnant to such freedom. This has frequently been laid down as law in the judgments of this court. In *Welton* v. *State of Missouri,* 91 U. S., 282, Mr. Justice Field, speaking for the court, said: "The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled." This was said in a case where the plaintiff in error had been convicted of selling goods without a license under a law of the State of Missouri, which prohibited any person from dealing as a peddler without a license, and which declared that a peddler was one dealing in goods or wares "not the growth, produce or manufacture of this State, [Missouri] by going from place to place to sell the same." . . . .

In the case of *Railroad Co.* v. *Husen,* 95 U. S., 465, 469, in which another law of the State of Missouri came up for consideration, which declared that no Texas, Mexican or Indian cattle should be driven, or otherwise conveyed into the State between the 1st of May and the 1st of November, unless carried through the State in cars, without being unloaded, this court, through Mr. Justice Strong, said: "It seems hardly necessary to argue at length that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations." In short, it may be laid down as the settled doctrine of this court, at this day, that a State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations.

This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with or restriction upon the free introduction of the plaintiffs' coal from the State of Pennsylvania into the State of Louisiana, and the free disposal of the same in commerce in the latter State; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the States: or only to an exercise of local adminstration under the general taxing power, which,

though it may incidentally affect the subjects of commerce, is entirely within the power of the State until Congress shall see fit to interfere and make express regulations on the subject.

As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of any other State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the city of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated.

It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale. Take the city of New York for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the west? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States? Of course the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their coming, would be

a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival within the State,—that being their place of destination for use or trade,—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to.

We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the City of New York, charged with the duty of collecting a tax on every wagon load, or car load of produce and merchandise brought into the city, that it would not be a regulation of, and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other States. We think it would be, and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of *Woodruff* v. *Parham,* which had no relation to the movement of goods from one State to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of that city, and which was only taxed as a part of that general mass in common with all other property in the city, and in precisely the same manner.

When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State. In the present case, we can see no such conflict, either in the law itself or in the proceedings which have been had under it and sustained by the State tribunals, nor any conflict with the general rule that a State cannot pass a law which shall interfere with the unrestricted freedom of commerce between the States.

In our opinion, therefore, the second assignment of error is untenable.

The only remaining assignment of error to be considered is, that the tax in question violated that clause of the Fourth Article of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." As the applicability of this objection did not occur to us upon reading the record of the case, we have carefully examined the

brief of the plaintiffs' counsel for light on the subject, but, so far as we can understand, the point is not urged. We are certainly unable to see how, or in what respect, any equality of privileges as citizens has been denied to the plaintiffs by the imposition of the tax. Their property was only taxed like that of all other persons, whether citizens of Louisiana or any other State or country. Not the slightest discrimination was made.

The judgment of the Supreme Court of Louisiana is

Affirmed.

WESTERN UNION TELEGRAPH CO. V. BOROUGH OF NEW HOPE.

Supreme Court of the United States. October, 1902.
187 United States, 419.

By an ordinance passed in 1894, the borough of New Hope, Pennsylvania, imposed an annual license fee of one dollar per pole and two dollars and a half per mile of wire on the telegraph, telephone, and electric light poles and wires within its limits. The Western Union Telegraph Company had constructed prior thereto and had since maintained and operated a line of telegraph poles and wires through the borough, and this was an action brought in the Court of Common Pleas of Bucks county, in that State, against the company to recover license fees for the four years commencing with 1895. The case came on for trial before the court and a jury, and plaintiff put in evidence the ordinance in question, and it was agreed "between the parties that for the year beginning October 1, 1895, there were seventy-five poles and twenty miles of wire, and for the three succeeding years beginning October 1, 1896, there were thirty-six poles and twelve miles of wire maintained by the defendant in said borough." Plaintiff then rested, and defendant offered evidence tending to show that the wires were used as through wires, for the transmission of messages between the different States, and the United States and foreign countries; that the company had no office at New Hope, which it operated itself, but that the Philadelphia and Reading Railroad Company handled the business there, and transferred it to the Western Union at Philadelphia; that no part of the business that went to or from New Hope went over these lines of wires and poles; and that the local business handed to the Western Union at Philadelphia amounted to from about

seven to seven and one-half dollars per month. The evidence further tended to show that the cost value of its lines through New Hope was about $372, and that the cost of inspection, repairs and maintenance of the plant of the company had averaged for thirteen years one dollar and forty-nine and one-half cents per wire per annum; that since October, 1894, the borough had not expended any money on account of the poles and wires of the company; that its expenditures were for repairing streets, street lamps, moderate sums in payment of official services, etc., and that when on holidays the burgess saw fit to appoint a policeman he often called on the constable, who was generally paid $2.50 per day. A lineman testified that during those years the borough never did anything, to his knowledge, "in the way of inspecting or repairing or removing or anything else in connection with the poles and wires of those telegraph companies." Defendants contended that the requirement of payment of the license fee in question amounted to a regulation of commerce, and that the ordinance was therefore void.

The court left it to the jury to find whether the license fee exceeded what was reasonable under the circumstances. The jury returned a verdict in favor of the plaintiff, and judgment was rendered thereon, which on error to the Superior Court was affirmed. 16 Pa. Superior Ct. Rep., 306. The Supreme Court of Pennsylvania refused to allow an appeal to that court.

Mr. Chief Justice FULLER, after making the foregoing statement, delivered the opinion of the court.

It is conceded that the borough had the right in the exercise of its police power to impose a reasonable license fee upon telegraph poles and wires within its limits, and that an ordinance imposing such fee is to be taken as *prima facie* reasonable. But it is insisted that on the evidence of this case the presumption of reasonableness is rebutted, and that the ordinance as administered is void because a regulation of interstate commerce. While in the exercise of its control over its streets, it is admitted that the borough may supervise the location of the poles erected to sustain the wires of the plaintiff in error, may require them to be marked, may make such inspection of them as may be necessary to protect the public welfare, and may impose a reasonable license fee for the cost of such regulation and supervision, and of the issuing of such permits as may be required for the enforcement thereof, yet it is contended that if the license fee turned out to be in excess of the amount necessary to reimburse the municipality the ordinance became unreasonable and invalid. The Superior Court in its opinion referred

to many decisions of the Supreme Court of Pennsylvania as definitely establishing, among other propositions, "that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defence," and "that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clear as to demonstrate an abuse of discretion on the part of the municipal authorities." And it was said that in many of the cases cited the license fee was the same as that imposed by this ordinance. 16 Superior Ct. Rep., 309. The Supreme Court affirmed the judgment in a similar case on the opinion given below in this. 202 Pa. St., 532.

In *Chester City* v. *Telegraph Company,* 154 Pa. St., 464, in which it was averred in the affidavit of defence that the rates charged were at least five times the amount of the expense involved in the supervision exercised by the municipality, the Supreme Court said: "For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is it does not go far enough. It refers only to the usual, ordinary or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of its telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake therefore to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit."

In *Taylor Borough* v. *Telegraph Company,* 202 Pa. St., 583, the Supreme Court said: "Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. . . . . Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a

question for the courts and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and the expense of the same." And see *City of Philadelphia* v. *Western Union Telegraph Company*, 89 Fed. Rep., 454.

Concurring in these views in general, we think it would be going much too far for us to decide that the test set up by the plaintiff in error must be necessarily applied, and the ordinance held void because of a failure to meet it. As the Supreme Court pointed out, the elements entering into the charge are various, and the Court of Common Pleas, the Superior Court, and the Supreme Court of Pennsylvania have held it to be reasonable, and we cannot say that their conclusion is so manifestly wrong as to justify our interposition.

The license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation, or business, but was a charge in the enforcement of local governmental supervision and as such not in itself obnoxious to the clause of the Constitution relied on. *St. Louis* v. *Telegraph Company*, 148 U. S., 92; 149 U. S., 465.

Judgment affirmed.

Mr. Justice WHITE, Mr. Justice PECKHAM and Mr. Justice McKENNA dissented.

STATE TAX ON RAILWAY GROSS RECEIPTS.

Supreme Court of the United States. December, 1872.
15 Wallace, 284.

Mr. Justice STRONG delivered the opinion of the court.

The question is whether the act of the legislature of Pennsylvania, passed February 23d, 1866, under which a tax was levied upon the Philadelphia and Reading Railroad Company of three-quarters of one per cent upon the gross receipts of the company during the six months ending December 31st, 1867, is in conflict with the third clause of the eighth section, article first, of the Constitution of the United States, which confers upon Congress the power to "regulate commerce with foreign nations, among the several States and with the Indian tribes;" or whether it is in conflict with the second clause of the tenth section of the same article, which prohibits the States, "without the consent of Congress, from laying any imposts or duties on imports or exports, except what may be absolutely neces-

sary for executing their inspection laws." It was claimed in the State courts that the act was unconstitutional so far as it taxes that portion of the gross receipts of companies which are derived from transportation from the State to another State, or into the State from another, and the Supreme Court of the State having decided adversely to the claim, the case has been brought here for review.

. . . .

Is, then, the tax imposed by the act of February 23d, 1866, a tax upon freight transported into, or out of, the State, or upon the owner of freight, for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon an instrument, such as the stage-coach, a railroad car, or a canal, or steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation, or upon commerce, and it has never been seriously doubted that such a tax may be laid. A tax upon landlords as such affects rents, and generally increases them, but it would be a misnomer to call it a tax upon tenants. A tax upon the occupation of a physician or an attorney, measured by the income of his profession, or upon a banker, graduated according to the amount of his discounts or deposits, will hardly be claimed to be a tax upon his patients, clients or customers, thought the burden ultimately falls upon them. It is not their money which is taken by the government. The law exacts nothing from them. But when, as in the other case between these parties, a company is made an instrument by the laws to collect the tax from transporters, when the statute plainly contemplates that the contribution is to come from them, it may properly be said that they are the persons charged. Such is not this case. The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied and, indeed, such a tax cannot be, until the expiration of each half-year, and until the money received for freights, and from other sources of income, has actually come into the company's hands. Then it has lost its dis-

tinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of general property in the country. That such a tax is not unwarranted is plain. Thus, in *Brown* v. *Maryland* (12 Wheat., 419-441), where it was ruled that a State tax cannot be levied, by the requisition of a license, upon importers of foreign goods by the bale or package, or upon other persons selling the same by bale or package, Chief Justice Marshall, considering the dividing line between the prohibition upon the States against taxing imports and their general power to tax persons and property within their limits, said that "when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State." This distinction in the liabilities of property in its different stages has ever since been recognized. (*Waring* v. *The Mayor,* 8 Wall., 122; *Pervear* v. *The Commonwealth,* 5 id., 479.) It is most important to the States that it should be. And yet if the States may tax at pleasure imported goods, so soon as the importer has broken the original packages, and made the first sale, it is obvious the tax will obstruct importation quite as much as would an equal impost upon the unbroken packages before they have gone to the markets. And this is so though no discrimination be made.

There certainly is a line which separates that power of the Federal government to regulate commerce among the States, which is exclusive, from the authority of the States to tax persons' property, business, or occupations, within their limits. This line is sometimes difficult to define with distinctness. It is so in the present case; but we think it may be safely laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between States, have become subject to legitimate taxation. It is not denied that net earnings of such corporations are taxable by State authority without any inquiry after their sources, and it is difficult to state any well-founded distinction between the lawfulness of a tax upon them and that of a tax

upon gross receipts, or between the effects they work upon commerce, except perhaps in degree. They may both come from charges made for transporting freight or passengers between the States, or out of exactions from the freight itself. Net earnings are a part of the gross receipts.

There is another view of this case to which brief reference may be made. It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would be an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same.

Influenced by these considerations, we hold that the act of the legislature of the State imposing a tax upon the plaintiffs in error equal to three-quarters of one per cent of their gross receipts is not invalid because in conflict with the power of Congress to regulate commerce among the States. And under the decision made in *Woodruff* v. *Parham* (8 Wall., 123), it is not invalid because it lays an impost or duty on imports or exports.

Judgment affirmed.

Mr. Justice MILLER (with whom concurred Justices FIELD and HUNT), dissenting.

PHILADELPHIA, ETC., STEAMSHIP CO. V. PENNSYLVANIA.

Supreme Court of the United States. October, 1886.
122 United States, 326.

The question in this case was, whether a State can constitutionally impose upon a steamship company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea, between different States, and to and from foreign countries.

. . . .

Mr. Justice BRADLEY, after stating the case . . . . . delivered the opinion of the court.

The question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress? The tax was levied directly upon the receipts derived by the company from its fares and freight for the transportation of persons and goods between different states and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that and nothing else. In view of the decisions of this court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the states upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and its power is necessarily exclusive whenever the subject matter is national in its character and properly admits of only one uniform system. See the cases collected in *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 492, 493. Interstate commerce carried on by ships on the sea is surely of this character.

If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: "We will not tax you for the transportation you perform, but we will tax you for what you get for

performing it." Such a position can hardly be said to be based on a sound method of reasoning.

. . . .

It is necessary, however, that we should examine what bearing the cases of the *State Freight Tax* and *Railway Gross Receipts*, reported in 15th of Wallace, have upon the question in hand. These cases were much quoted in argument, and the latter was confidently relied on by the counsel of the Commonwealth. They both arose under certain tax laws of Pennsylvania. The first, which is reported under the title of *Case of the State Freight Tax*, 15 Wall. 232, was that of the Reading Railroad Company. . . . . .

The court in its opinion took notice of the fact that the law was general in its terms, making no distinction between freight transported wholly within the state and that which was destined to, or came from another state. But it was held that this made no difference. The law might be valid as to one class, and unconstitutional as to the other. . . . . .

If this case stood alone, we should have no hesitation in saying that it would entirely govern the one before us; for, as before said, a tax upon fares and freights received for transportation is virtually a tax upon the transportation itself. But at the same time that the *Case of State Freight Tax* was decided, the other case referred to, namely, that of *State Tax on Railway Gross Receipts*, was also decided, and the opinion was delivered by the same member of the court. 15 Wall. 284. This was also a case of a tax imposed upon the Reading Railroad Company. . . . . . These receipts were derived partly from the freight of goods transported wholly within the state, and partly from the freight of goods exported to points without the state, which latter were discriminated from the former in the reports made by the company. It was the tax on the latter receipts which formed the subject of controversy. The same line of argument was taken at the bar as in the other case. This court, however, held the tax to be constitutional. The grounds on which the opinion was based in order to distinguish this case from the preceding one, were two: first, that the tax, being collectible only once in six months, was laid upon a fund which had become the property of the company, mingled with its other property, and incorporated into the general mass of its property, possibly expended in improvements, or otherwise invested. The case is likened, in the opinion, to that of taxing goods which have been imported, after their original packages have been broken, and after they have been

mixed with the mass of property in the country, which, it was said, are conceded in *Brown* v. *Maryland* to be taxable.

. . . .

A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown* v. *Maryland;* but, on the contrary, that the reasoning in that case is decidedly against it.

The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business,—which in this case is the business of transportation in carrying on interstate and foreign commerce,—it would clearly be unconstitutional.

. . . .

The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence. It is unnecessary, therefore, to review the long list of cases in which the subject is discussed. Those referred to are abundantly sufficient for our purposes. We may add, however, that since the decision of the *Railway Tax Cases* now reviewed, a series of cases has received the consideration of this court, the decisions of which are in general harmony with the views here expressed, and show the extent and limitations of the rule that a state cannot regulate or tax the operations or objects of interstate or foreign commerce. . . . . .

Our conclusion is, that the imposition of the tax in question in this cause was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution.

The judgment of the Supreme Court of Pennsylvania is, therefore, reversed, and the case is remanded to be disposed of according to law, in conformity with this opinion.

RATTERMAN V. WESTERN UNION TELEGRAPH CO.

Supreme Court of the United States. May, 1888.
127 United States, 411.

Mr. Justice MILLER, after stating the case, delivered the opinion of the court.

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With regard to the question which is certified to us as dividing the opinions of the judges of the Circuit Court, we do not think that there is any difficulty, and can hardly see how it arose in the present case. The question is "whether a single tax, assessed under the Revised Statutes of Ohio, § 2778, upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that said receipts were derived from interstate commerce."

We do not think this particular question is material in this case, because the state of facts* agreed upon between the parties makes this separation and presents the matter to the court, freed from the point raised by the question that the tax was not separable. Nor do we believe, if there were allegations either in the bill or answer setting up that part of the tax was from interstate commerce and part from commerce wholly within the State, that there would have been any difficulty in securing the evidence of the amount of receipts chargeable to these separate classes of telegrams, by means of the appointment of a referee or master to inquire into that fact and make report to the court. Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that so far as it was only upon commerce wholly within the State it was valid.

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In *Pensacola Telegraph Co.* v. *Western Union Telegraph Company,* 96 U. S., 1, it was decided by this court that the telegraph was an instrument of commerce; that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business, and that such a company occupies the

*The statement of facts shows that the Western Union Telegraph Company was incorporated under the laws of New York.

same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods.

In *Telegraph Company* v. *Texas*, 105 U. S., 460, the same question presented in this case was before the court, that of the power of the State to tax telegraphic messages received and delivered by the same corporation which is now before us. In that case no distinction was made by the statute between what we now call interstate messages and those exclusively within the State. This court, therefore, in reviewing the decision of the Supreme Court of the State of Texas, which had allowed no deduction for taxes on messages sent out of the State, or by government officers on government business, said: "It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations, or States, or the Indian tribes—that is to say, the purely internal commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another, exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States. Whether the law of Texas, in its present form, can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review."

The court reversed the judgment of the Supreme Court of Texas, and remanded the cases with instructions for such further proceedings as justice might require. Evidently, the purpose of this was to permit the Supreme Court of that State, if it could separate the taxes upon the two classes of telegrams, to do so, and render judgment accordingly.

In the recent case of *The Western Union Telegraph Company* v. *The Attorney General of the Commonwealth of Massachusetts,* 125 U. S., 530, decided at this term, a tax was levied upon that corporation, apportioned under the laws of Massachusetts upon the taxable value of its capital stock. The ratio which should have been allotted to that commonwealth may be supposed to have been properly apportioned to it, ascertaining that portion by means of the length of the lines of the company in relation to the entire mileage

of its lines in the United States. The payment of the tax was resisted, however, partly upon the ground that it was levied upon interstate commerce, but mainly because it was asserted to be a violation of the rights conferred on the company by the act of July 24, 1866, now Title LXV., §§ 5263 to 5269, of the Revised Statutes. It was alleged that the defendant company, having accepted the provisions of that law, was entirely exempt from taxation by the State. This court, however, held that this exemption only extended under that law to so much of the lines of the telegraph company as were, in the language of § 5263, "through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States."

It was shown in that case that, of the 2833.05 miles of the lines of the defendant corporation within the boundaries of Massachusetts, more than 2334.55 miles came within the terms of that section, being over or along post roads, made such by the United States, or over, under, or across its navigable streams or waters, leaving only 498.50 miles not within such description, on which the company offered to pay the proportion of the tax assessed against it according to mileage by the State authorities.

We refer to this now only for the purpose of showing how easily the subject of taxation which is forbidden by the Constitution may be separated from that which is permissible in this class of cases. The court held in that case that this tax, being in effect levied upon the capital stock or property of the company in the State of Massachusetts, which was ascertained upon the basis of the proportion which the length of its lines in that State bore to their entire length throughout the whole country, and not upon its messages or upon the receipts for such messages, was a valid tax.

. . . .

Under these views, we answer the question, in regard to which the judges of the Circuit Court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is *not* wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce. Concurring, therefore, with the circuit judge in his action, enjoining the collection of the taxes on that portion of the

receipts derived from interstate commerce, and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, this decree is *Affirmed.*

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2. *State Taxation of Imports.*

BROWN V. STATE OF MARYLAND.

Supreme Court of the United States. March, 1827.
12 Wheaton, 419.

Mr. Chief Justice Marshall delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that Court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted, that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them on demurrer for the penalty which the act prescribes for the offence; and that judgment is now before this Court.

The cause depends entirely on the question, whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported.

It has been truly said, that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality. The plaintiffs in error take the burthen upon themselves, and insist that the act under consideration

is repugnant to two provisions in the Constitution of the United States.

1. To that which declares that "no State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon States "to lay any imposts or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

. . . .

What, then, is the meaning of the words, "imposts, or duties on imports or exports?"

An impost, or duty on imports, is a custom or tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports?" The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after the article has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act on importations, they are generally executed on articles which are landed. The tax

or duty of inspection, then, is a tax which is frequently, if not always paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favour of duties for the support of the inspection laws, goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the subject, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with greater interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noted. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from the apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connexions with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain, that the object would be as completely defeated by a power to

tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between the power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious, that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular State. We are told, that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The States will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any State would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason be said, that no State would be so blind to its own interests as to lay duties on importations which would either prohibit or diminish its trade. Yet the framers of our Constitution have thought this a power which no State ought to exercise. Conceding, to the full extent which is required, that every State would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded, that each would respect the interest of others. A duty on imports is a tax on the article which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favourable to

importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the States. When we are inquiring whether a particular act is within this prohibition, the question is not, whether the State may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown, that a tax on the article in the hands of the importer, is within its words; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it while entering the port.

The counsel for the State of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the States, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must therefore be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the State to tax commences.

It may be conceded, that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all Courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in mark-

ing the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

The counsel for the plaintiffs in error contend, that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported on the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows, that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavoured to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it. He may sell by retail, at auction, or as an itinerant pedlar. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as

plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration. But, we think, they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove, that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, by breaking up his packages, and travelling with them as an itinerant pedlar. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So, if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ, them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the State. The right of sale may be very well annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, within the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed,

the laws of the United States expressly sanction the health laws of a State.

The principle, then, for which the plaintiffs in error contend that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no farther than to prevent the States from doing that which it was the great object of the Constitution to prevent.

But, if it should be proved, that a duty on the article itself would be repugnant to the Constitution, it is still argued, that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution.

In support of the argument, that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As, to export, it is said, means only to carry goods out of the country; so, to import, means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States

should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the Constitution which declares, that "no State shall lay any imposts or duties on imports or exports."

2. It is also repugnant to that clause of the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes?"

The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and

justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

This question was considered in the case of *Gibbons* v. *Ogden,* (9 Wheat. Rep. 1,) in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficiency should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just re-

proaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument, to say, that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused? The power claimed by the State, is in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce.

It has been contended, that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a State to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit, that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and State governments, as a vital principle of perpet-

ual operation. It results, necessarily, from this principle, that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the Courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up, and considered with great attention, in *McCulloch* v. *The State of Maryland,* (4 Wheat. Rep. 316,) the decision in which case is, we think, entirely applicable to this.

It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the Court of Appeals of the State of Maryland, in affirming the judgment of the Baltimore City Court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the Constitution of the United States and, consequently, void. The judgment is to be reversed, and the cause remanded to that Court, with instructions to enter judgment in favour of the appellants.

Mr. Justice THOMPSON dissented.

COOK V. PENNSYLVANIA.

Supreme Court of the United States. October, 1878.
97 United States, 566.

Mr. Justice MILLER delivered the opinion of the court.

The act of the legislature of Pennsylvania, of May 20, 1853, (Pamphlet Laws, 683), declares that—

> "The State duty to be paid on sales by auction in the counties of Philadelphia and Allegheny shall be on all domestic articles and groceries, one-half of one per cent; on foreign drugs, glass, earthenware, hides, marble-work, and dye-woods, three-quarters of one per cent."

By the sixth section of the act of April 9, 1859, the law was modified, as follows:—

> "Said auctioneers shall pay into the treasury of the Commonwealth a tax or duty of one-fourth of one per cent on all sales of loans or stocks, and shall also pay into the treasury aforesaid a tax or duty, as required by existing laws, on all other sales to be made as aforesaid, except on groceries, goods, wares, and merchandise of American growth or manufacture, real estate, shipping, or live stock; and it shall be the duty of the auctioneer having charge of such sales to collect and pay over to the State treasurer the said duty or tax, and give a true and correct account of the same quarterly, under oath or affirmation, in the form now required by law." Pamphlet Laws 436.

The effect of this legislation is, that by the first statute a discrimination of one-fourth of one per cent is made against foreign goods sold by auction; and by the last statute, while all sales of foreign or imported goods are taxed, those arising from groceries, goods, wares, and merchandise of American growth or manufacture are exempt from such law.

It appears that the law also required these auctioneers to take out a license, to make report of such sales, and to pay into the treasury the taxes on these sales.

The defendant refused to pay the tax for which he was liable under this law, for the sale of goods which had been imported and which he had sold for the importers in the original packages. In the suit, in which judgment was rendered against him in the Supreme Court of Pennsylvania, he defended himself on the ground

that these statutes were void, because forbidden by sects. 8 and 10 of art. 1 of the Constitution of the United States.

The clauses referred to are those which give to Congress power to regulate commerce with foreign nations, and forbid a State, without the consent of Congress, to levy any imposts or duties on imports. The case stated shows that the goods sold by defendant were imported goods, and that they were sold by him in the packages in which they were originally imported. It is conceded by the Attorney-General of the State, that if the statute we have recited is a tax on these imports, it is justly obnoxious to the objection taken to it.

But it is argued that the authority of the auctioneer to make any sales is derived from the State, and that the State can, therefore, impose upon him a tax for the privilege conferred, and that the mode adopted by the statute of measuring that tax is within the power of the State. That being a tax on him for the right or privilege to sell at auction, it is not a tax on the article sold, but the amount of the sales made by him is made the measure of the tax on that privilege. In support of this view, it is said that the importer could himself have made sale of his goods without subjecting the sale to the tax. The argument is fallacious, because without an auctioneer's license he could not have sold at auction even his own goods. If he had procured, or could have procured, a license, he would then have been subject by the statute to the tax, for it makes no exception. By the express language of the statute, the auctioneer is to collect this tax and pay it into the treasury. From whom is he to collect it if not from the owner of the goods? If the tax was intended to be levied on the auctioneer, he would not have been required first to collect it and then pay it over. It was, then, a tax on the privilege of selling foreign goods at auction, for such goods could only be sold at auction by paying the tax on the amount of the sales.

The question as thus stated has long ago and frequently been decided by this court.

In the *Passenger Cases* (7 How. 283), a statute of New York was the subject of consideration, which required an officer of the city of New York, called the health commissioner, to collect from the master of every vessel from a foreign port, for himself and each cabin passenger on board his vessel, one dollar and fifty cents, and for each steerage passenger, mate, sailor, or mariner, one dollar. A statute of the State of Massachusetts was also considered, which enacted that no alien passengers (other than certain diseased persons and paupers, provided for in a previous section) should be permitted to land until the master, owner, consignee, or agent of such vessel

should pay to the regularly appointed boarding officers the sum of two dollars for each passenger so landing. In both instances, although the master or the owner of the vessel was made to pay the sum demanded, it was held to be a tax on the passengers. It was he whose loss it was when paid, and the burden rested ultimately and solely on him. Mr. Chief Justice Taney says: "It is demanded of the captain, and not from every separate passenger, for the convenience of collection. But the burden evidently falls on the passenger, and he, in fact, pays it, either in the enhanced price of his passage, or directly to the captain, before he is allowed to embark for the voyage." Because it was such a tax, the majority of the court held it to be unconstitutional and void.

In the case of *Crandall* v. *State of Nevada,* (6 Wall. 35), the State had passed a law requiring those in charge of all the stage-coaches and railroads doing business in the State to make report of every passenger who passed through the State or went out of it by their conveyances, and to pay a tax of one dollar for every such passenger. The argument was urged there, that the tax was laid on the business of the railroad and stage-coach companies, and the sum of one dollar exacted for each passenger was only a mode of measuring the business to be taxed. But the court said, as in *Passenger Cases,* that it was a tax which must fall on the passenger, and be paid by him for the privilege of riding through the State by the usual vehicles of travel.

. . . .

In *Henderson* v. *The Mayor* (92 U. S. 259), where the owners of vessels from a foreign port were required to give a bond, as security, that every passenger whom they landed should not become a burden on the State, or pay for every such passenger a fixed sum, it was held to be in effect a tax of that sum on the passenger, however disguised by the alternative of a bond which would never be given. The court said, that "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore and landed at the port of New York, it is as much a tax on passengers, if collected from them, or a tax on the vessel owner for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases.*"

To the same effect, and probably more directly in point, is the case of *Welton* v. *State of Missouri* (91 id. 275), decided at the same

term. In that case, pedlers were required, under a severe penalty, to take out a license; and those only were held to be pedlers who dealt in goods, wares, and merchandise which were not of the growth, produce, or manufacture of the State. The court, after referring to the case of *Brown* v. *Maryland,* relied on by defendant here, adds: "So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product of manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves and the question presented is, whether legislation, thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers, is valid under the Constitution of the United States." And it was decided that it was not. See also *Waring* v. *The Mayor,* 8 Wall. 110.

The tax on sales made by an auctioneer is a tax on the goods sold, within the terms of this last decision, and, indeed, within all the cases cited; and when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports.

In *Woodruff* v. *Parham* (8 Wall. 123) and *Hinson* v. *Lott* (id. 128), it was held that a tax laid by a law of the State in such a manner as to discriminate unfavorably against goods which were the product or manufacture of another State, was a regulation of commerce between the States, forbidden by the Constitution of the United States. The doctrine is reasserted in the case of *Welton* v. *State of Missouri, supra.* The Congress of the United States is granted the power to regulate commerce with foreign nations in precisely the same language as it is that among the States. If a tax assessed by a State injuriously discriminating against the products of a State of the Union is forbidden by the Constitution, a similar tax against goods imported from a foreign State is equally forbidden.

A careful reader of the history of the times which immediately preceded the assembling of the convention that framed the American Constitution cannot fail to discover that the need of some equitable and just regulation of commerce was among the most influential causes which led to its meeting. States having fine harbors imposed unlimited tax on all goods reaching the Continent through their ports. The ports of Boston and New York were far behind Newport, in the State of Rhode Island, in the value of their imports; and that small State was paying all the expenses of her government by the duties levied on the goods landed at her principal

port. And so reluctant was she to give up this advantage, that she refused for nearly three years after the other twelve original States had ratified the Constitution, to give it her assent.

In granting to Congress the right to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, and in forbidding the States without the consent of that body to levy any tax on imports, the framers of the Constitution believed that they had sufficiently guarded against the dangers of any taxation by the States which would interfere with the freest interchange of commodities among the people of the different States, and by the people of the States with citizens and subjects of foreign governments.

The numerous cases in which this court has been called on to declare void statutes of the States which in various ways have sought to violate this salutary restriction, show the necessity and value of the constitutional provision. If certain States could exercise the unlimited power of taxing all the merchandise which passes from the port of New York through those States to the consumers in the great West, or could tax—as has been done until recently—every person who sought the seaboard through the railroads within their jurisdiction, the Constitution would have failed to effect one of the most important purposes for which it was adopted.

A striking instance of the evil and its cure is to be seen in the recent history of the States now composing the German Empire. A few years ago they were independent States, which, though lying contiguous, speaking a common language, and belonging to a common race, were yet without a common government.

The number and variety of their systems of taxation and lines of territorial division necessitating customs officials at every step the traveller took or merchandise was transported, became so intolerable, that a commercial, though not a political union was organized, called the German Zollverein. The great value of this became so apparent, and the community of interests so strongly felt in regard to commerce and traffic, that the first appropriate occasion was used by these numerous principalities to organize a common political government now known as the German Empire.

While there is, perhaps, no special obligation on this court to defend the wisdom of the Constitution of the United States, there is the duty to ascertain the purpose of its provisions, and to give them full effect when called on by a proper case to do so.

The judgment of the Supreme Court of Pennsylvania will be reversed, and the case remanded for further proceedings, in conformity with this opinion; and it is *So ordered.*

WARING V. THE MAYOR.

Supreme Court of the United States. December, 1868.
8 Wallace, 110.

Mr. Justice CLIFFORD delivered the opinion of the court.

Merchants and traders, engaged in selling merchandise in the city of Mobile in the State of Alabama, are required by an ordinance passed by the corporate authorities to pay a tax to the city equal to one-half of one per cent. on the gross amount of their sales, whether the merchandise was sold at private sale or at public auction; and if they were not so engaged the six months next preceding the 1st day of April, 1866, they were also required, within fifteen days thereafter, to return, under oath, to the collector of taxes, the gross amount of their sales during that period of time; and the provision was, that if any such merchant or trader neglected or failed to make such return, he should be subject to such a fine, not exceeding fifty dollars per day, as the mayor of the city might impose for each day's failure or refusal.

Sales of merchandise were made by the complainant within that period to a large amount, and he was duly notified that he was required to make return, under oath, of the gross amount of such sales, and having neglected and refused to comply with that requirement within the time specified in the ordinance, the mayor of the city caused a summons to be issued and duly served, commanding the complainant to appear before him, as such mayor, to answer for such neglect, but he refused to obey the commands of the summons, and thereupon a warrant was issued, and he was arrested and brought before the mayor to answer for such contempt; and, after hearing, he was sentenced to pay a fine of fifty dollars for a breach of the before-mentioned ordinance. Subsequently, a second notice of a similar character was given, and the complainant still neglecting and refusing to make the required returns, he was again summoned to appear before the mayor to answer for the neglect, but he refused a second time to obey the commands of the precept, and, thereupon, such proceedings were had that he was again found guilty of contempt and was sentenced to pay an additional fine of fifty dollars.

Regarding these proceedings as unwarranted, the complainant filed a bill in equity against the mayor and tax-collector of the city, in the local Chancery Court, in which he prayed that the respondents might be enjoined from collecting the fines adjudged against him, and from any attempt to collect the tax, and that the tax might be

adjudged to be null and void. Proofs were taken and the parties were heard, and the final decree of the Chancellor was, that the complainant was entitled to the relief asked, and that the injunction should be made perpetual; but that decree, on the appeal of the respondents to the Supreme Court of the State, was, in all things, reversed, and the Supreme Court entered a decree that the bill of complaint should be dismissed. Whereupon the complainant in the Chancery Court sued out a writ of error, under the 25th section of the Judiciary Act, and removed the cause into this court.

Exemption from State taxation in this case is claimed by complainant upon the ground that the sales made by him were of merchandise, in the original packages, as imported from a foreign country, and which was purchased by him, in entire cargoes, of the consignees of the importing vessels before their arrival, or while the vessels were in the lower harbor of the port.

. . . .

Whether the contracts to purchase were made before or after the vessel arrived in the bay is quite immaterial, as the agreement was, that the risk should continue to be in the owner or consignees until they delivered the salt into the complainant's lighters, alongside of the vessel. Delivery, under the terms of the contract, could not be made before the vessel arrived, nor before the salt was legally entered at the custom-house, as the hatches could not be removed for any such purpose until the permit was received from the collector.

Undoubtedly goods at sea may be sold by the consignees to arrive, and if they indorse and deliver the bill of lading to the purchaser, and he accepts the same under the contract as the proper substitute for the actual delivery and acceptance of the goods, the effect of the transaction is to vest a perfect title in the purchaser, discharged of all right of stoppage *in transitu* on the part of the vendor and indorser of the bill of lading.

Nothing of the kind, however, was done in this case. On the contrary, the agreement was, that the loss, if before the delivery of the goods into the lighters, should fall on the shippers. Influenced by these considerations the court is of the opinion that the shippers or consignees were the importers of the salt, and that the complainant was the purchaser of the importers, and the second vendor of the imported merchandise.

. . . .

Congress has the power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, and the Constitution also provides that no State shall, without the consent

of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, with a view to raise a revenue for State purposes. The State of Maryland passed a law requiring all importers of foreign articles, enumerated in the law, and other persons selling the same by wholesale, before they should be authorized to sell the imported articles, to take a license, for which they were required to pay fifty dollars, and in case of refusal or neglect, the provision was, that they should forfeit the amount of the license tax and be subject to a fine of one hundred dollars. (*Brown* v. *Maryland,* 12 Wheaton, 437.) Subsequently an importing merchant, resident in the State, refused to pay the tax, and the State Court sustained the validity of the State law, and imposed on him the penalty therein prescribed. Dissatisfied with the judgment he removed the cause into this court by writ of error, and this court held, Marshall, C. J., giving the opinion of the court, that the State law was a tax on imports, and that the mode of levying it, as by a tax on the occupation of the importer, merely varied the form in which the tax was imposed without varying the substance; that while the articles imported remained the property of the importer in his warehouse in the original forms or packages in which they were imported, a tax upon them was too plainly a duty on imports to escape the prohibition of the Constitution, but the court admitted that whenever the importer had so acted upon the thing imported that it has become incorporated and mixed with the mass of property in the country, it must be considered as having lost its distinctive character as an import, and as having become subject to the taxing power of the State.

Sales by the importer are held to be exempt from State taxation because the importer purchases, by the payment of the duty, a right to dispose of the merchandise as well as to bring it into the country, and because the tax, if it were held to be valid, would intercept the import, as an import, in the way to become incorporated with the general mass of property, and would deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the State. (*Brown* v. *Maryland,* 12 Wheaton, 443; *Almy* v. *California,* 24 Howard, 173.)

But the sales of the goods imported in this case were made by the shippers or consignees, and the complainant was the purchaser, and not the first vendor of the imported merchandise, and it is settled law in this court that merchandise in the original packages once sold by the importer is taxable as other property. (*Pervear* v. *Commonwealth,* 5 Wallace, 479.)

When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer.

Importers selling the imported articles in the original packages are shielded from any such State tax, but the privilege of exemption is not extended to any purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import.

Decree affirmed.

Original packages are the boxes or cases in which the goods are shipped and not the packages in which goods are placed by maker, and which are surrounded by an outer case. May v. New Orleans 178 U. S., 496.

WOODRUFF V. PARHAM.

Supreme Court of the United States. December, 1868.
8 Wallace, 123.

Error to the Supreme Court of Alabama. The case being thus:

The Constitution thus ordains:

"Congress shall have power to regulate commerce with foreign nations and among the several States."

"No State shall levy any imposts or duties on imports or exports."

"The citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States."

With these declarations of the Constitution in force, the city of Mobile, Alabama, in accordance with a provision in its charter, authorized the collection of a tax for municipal purposes on real and personal estate, sales at auction, and sales of merchandise, capital employed in business and income within the city. This ordinance being on the city statute book, Woodruff and others, auctioneers, received, in the course of their business for themselves, or as consignees and agents for others, large amounts of goods and merchandise, the product of States other than Alabama, and sold the same in Mobile to purchasers in the original and unbroken packages. Thereupon, the tax collector for the city, demanded the tax levied by the ordinance. Woodruff refused to pay the tax, asserting that it was repugnant to the above-quoted provisions of the Constitution. The question coming finally, on a case stated, in to the Supreme Court

of the State, where the first two of the above-quoted provisions of the Constitution were relied on by the auctioneers as a bar to the suit, and said court decided in favor of the tax. And the question was now here for review.

Mr. Justice MILLER delivered the opinion of the court.

The case was heard in the courts of the State of Alabama upon an agreed statement of facts, and that statement fully raises the question whether merchandise brought from other States and sold, under the circumstances stated, comes within the prohibition of the Federal Constitution, that no State shall, without the consent of Congress, levy any imposts or duties on imports or exports. And it is claimed that it also brings the case within the principles laid down by this court in *Brown* v. *Maryland*. (12 Wheaton 419).

That decision has been recognized for over forty years as governing the action of this court in the same class of cases, and its reasoning has been often cited and received with approbation in others to which it was applicable. We do not now propose to question its authority or to depart from its principles.

The tax of the State of Maryland, which was the subject of controversy in that case, was limited by its terms to importers of foreign articles or commodities, and the proposition that we are now to consider is whether the provision of the Constitution to which we have referred extends, in its true meaning and intent, to articles brought from one State of the Union into another.

. . . .

The words impost, imports, and exports are frequently used in the Constitution. They have a necessary correlation, and when we have a clear idea of what either word means in any particular connection in which it may be found, we have one of the most satisfactory tests of its definition in other parts of the same instrument.

In the case of *Brown* v. *Maryland,* the word imports, as used in the clause now under consideration, is defined, both on the authority of the lexicons and usage, to be articles brought into the country; and impost is there said to be a duty, custom or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would, for a moment, think of them as having relation to any other articles than those brought from a country foreign to the United States, and at the time the case of *Brown* v. *Maryland* was decided—namely, in 1827—it is reasonable to suppose the general usage was the same, and that in defining imports as articles brought into the country, the Chief Justice used the word country as a synonyme for United States.

But the word is susceptible of being applied to articles introduced from one State into another, and we must inquire if it was so used by the framers of the Constitution.

Leaving, then, for a moment, the clause of the Constitution under consideration, we find the first use of any of these correlative terms in that clause of the eighth section of the first article, which begins the enumeration of the powers confided to Congress.

"The Congress shall have power to levy and collect taxes, duties, imposts, and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States."

Is the word impost, here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not, at the same time, exported from the former. But if we give to the word imposts, as used in the first-mentioned clause, the definition of Chief Justice Marshall, and to the word export the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts.

It is also to be remembered that the Convention was here giving the right to lay taxes by National authority in connection with paying the debts and providing for the common defence and the general welfare, and it is a reasonable inference that they had in view, in the use of the word imports, those articles, which, being introduced from other nations and diffused generally over the country for consumption, would contribute, in a common and general way, to the support of the National government. If internal taxation should become necessary, it was provided for by the terms taxes and excises.

There are two provisions of the clause under which exemption from State taxation is claimed in this case, which are not without influence on that prohibition, namely: that any State may, with the assent of Congress, lay a tax on imports, and that the net produce of such tax shall be for the benefit of the Treasury of the United States. The framers of the Constitution, claiming for the General Government, as they did, all the duties *on foreign* goods imported into the country, might well permit a State that wished to tax more heavily than Congress did, foreign liquors, tobacco, or other articles

injurious to the community, or which interfered with their domestic policy, to do so, provided such tax met the approbation of Congress, and was paid into the Federal treasury. But that it was intended to permit such a tax to be imposed by such authority on the products of neighboring States for the use of the Federal government, and that Congress, under this temptation, was to arbitrate between the State which proposed to levy the tax and those which opposed it, seems altogether improbable.

Yet this must be the construction of the clause in question if it has any reference to goods imported from one State to another.

If we turn for a moment from the consideration of the language of the Constitution to the history of its formation and adoption, we shall find additional reason to conclude that the words imports and imposts were used with exclusive reference to articles imported from foreign countries.

Section three, article six, of the Confederation provided that no State should lay imposts or duties which might interfere with any stipulation in treaties entered into by the United States; and section one, article nine, that no treaty of commerce should be made whereby the legislative power of the respective States should be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, or, from prohibiting the exportation or importation of any species of goods or commodities whatsoever. In these two articles of the Confederation, the words imports, exports, and imposts are used with exclusive reference to foreign trade, because they have regard only to the treaty-making power of the federation.

As soon as peace was restored by the success of the Revolution, and commerce began to revive, it became obvious that the most eligible mode of raising revenue for the support of the General Government and the payment of its debts was by duties on foreign merchandise imported into the country. The Congress accordingly recommended the States to levy a duty of five per cent. on all such imports, for the use of the Confederation. To this, Rhode Island, which, at that time, was one of the largest importing States, objected, and we have a full report of the remonstrance addressed by a committee of Congress to that State on that subject. (1 Elliot's Debates, 131-3.) And the discussions of the Congress of that day, as imperfectly as they have been preserved, are full of the subject of the injustice done by the States who had good sea ports, by duties levied in those ports on foreign goods designed for States who had no such ports.

In this state of public feeling in this matter, the Constitutional Convention assembled.

Its very first grant of power to the new government about to be established, was to lay and collect imposts or duties on foreign goods imported into the country, and among its restraints upon the States was the corresponding one that *they* should lay no duties on imports or exports. It seems, however, from Mr. Madison's account of the debates, that while the necessity of vesting in Congress the power to levy duties on foreign goods was generally conceded, the right of the States to do so likewise was not given up without discussion, and was finally yielded with the qualification to which we have already referred, that the States might lay such duties with the assent of Congress. Mr. Madison moved that the words "nor lay imposts or duties on imports" be placed in that class of prohibitions which were absolute, instead of those which were dependent on the consent of Congress. His reason was that the States interested in this power, (meaning those who had good seaports), by which they could tax the imports of their neighbors passing through their markets, were a majority, and could gain the consent of Congress to the injury of New Jersey, North Carolina, and other non importing States. But his motion failed. (5 Madison Papers, 486.) In the Convention of Virginia, called to adopt the Constitution, that distinguished expounder and defender of the instrument, so largely the work of his own hand, argued, in support of the authority to lay direct taxes, that without this power, a disproportion of burden would be imposed on the Southern States, because having fewer manufactures, they would consume more imports and pay more of the imposts. (3 Elliot's Debates, 248.) So, in defending the clause of the Constitution now under our consideration, he says: "Some States export the produce of other States. Virginia exports the produce of North Carolina; Pennsylvania those of New Jersey and Delaware; and Rhode Island, those of Connecticut and Massachusetts. The exporting States wished to retain the power of laying duties on exports to enable them to pay expenses incurred. The States whose produce was exported by other States, were extremely jealous lest a contribution should be raised of them by the exporting States, by laying heavy duties on their own commodities. If this clause be fully considered it will be found to be more consistent with justice and equity than any other practicable mode; for, if the States had the exclusive imposition of duties on exports, they might raise a heavy contribution of the other States for their own exclusive emoluments." (2 id. 443-4.) Similar observations, from the same source are found in

the 42d number of the Federalist, but with more direct reference to the power to regulate commerce.

Governor Ellsworth, in opening the debate of the Connecticut Convention on the adoption of the Constitution, says: "Our being tributary to our sister States, is in consequence of the want of a Federal system. The State of New York raises £60,000 or £80,000 in a year by impost. Connecticut consumes about one-third of the goods upon which this impost is laid, and consequently pays one-third of this sum to New York.

"If we import by the medium of Massachusetts, she has an impost, and to her we pay tribute." (2 Elliot's Debates, 192.) A few days later, he says: "I find, on calculation, that a general impost of five per cent. would raise a sum of £245,000," and adds; "it is a strong argument in favor of an impost, that the collection of it will interfere less with the internal police of the States than any other species of taxation. It does not fill the country with revenue officers, but is confined to the seacoast, and is chiefly a water operation. . . . . . If we do not give it to Congress, the individual States will have it." (2 Id. 196.)

It is not too much to say that, so far as our research has extended, neither the word export, import, or impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. The only allusion to imposts in the Articles of Confederation is clearly limited to duties on goods imported from foreign States. Where ever we find the grievance to be remedied by this provision of the Constitution alluded to, the duty levied by the States on foreign importations is alone mentioned, and the advantages to accrue to Congress from the power confided to it, and withheld from the States, is always mentioned with exclusive reference to foreign trade.

Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by *this clause*, the right of one State to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the Constitution as thus construed.

The merchant of Chicago who buys his goods in New York and

sells at wholesale in the original packages, may have his millions employed in trade for half a life time and escape all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchases his goods in New York, is exempt from taxation. If his neighbor purchases in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens.

These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown* v. *Maryland,* the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible.

It is said, however, that, as a court, we are bound, by our former decisions, to a contrary doctrine, and we are referred to the cases of *Almy* v. *State of California* and *Brown* v. *Maryland,* in support of the assertion.

The case first mentioned arose under a statute of California, which imposed a stamp tax on bills of lading for the transportation of gold and silver from any point within the State to any point without the State.

The master of the ship Rattler was fined for violating this law, by refusing to affix a stamp to a bill of lading for gold shipped on board his vessel from San Francisco to New York. It seems to have escaped the attention of counsel on both sides, and of the Chief Justice who delivered the opinion, that the case was one of inter-state commerce. No distinction of the kind is taken by counsel, none alluded to by the court, except in the incidental statement of the *termini* of the voyage. In the language of the court, citing *Brown* v. *Maryland,* as governing the case, the statute of Maryland is described as a tax on foreign articles and commodities. The only question *discussed* by the court is, whether the bill of lading was so intimately connected with the articles of export described in it that a tax on it was a tax on the articles exported. And, in arguing this proposition, the Chief Justice says that "a bill of lading, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to *a foreign country,* and consequently a duty upon that is, in substance and effect, a duty on the article exported."

It is impossible to examine the opinion without perceiving that the mind of the writer was exclusively directed to foreign commerce, and there is no reason to suppose that the question which we have discussed was in his thought. We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made. (*The Victory*, 6 Wallace, 382.)

The case, however, was well decided on the ground taken by Mr. Blair, counsel for defendant, namely: that such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall* v. *Nevada*, (Ib. 35,) and with the authority of Congress to regulate commerce among the States. We do not regard it, therefore, as opposing the views which we have announced in this case.

The case of *Brown* v. *Maryland*, as we have already said, arose out of a statute of that State, taxing, by way of discrimination, importers who sold, by wholesale, foreign goods.

Chief Justice Marshall, in delivering the opinion of the court, distinctly bases the invalidity of the statute, (1) On the clause of the Constitution which forbids a State to levy imposts or duties on imports; and (2). That which confers on Congress the power to regulate commerce with foreign nations, among the States, and with the Indian tribes.

The casual remark, therefore, made in the close of the opinion, "that we suppose the principles laid down in this case to apply equally to importations from a sister State," can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. It is not, therefore a judicial decision of the question, even if the remark was intended to apply to the first of the grounds on which that decision was placed.

But the opinion in that case discusses, as we have said, under two distinct heads, the two clauses of the Constitution which he supposed to be violated by the Maryland statute, and the remark above quoted follows immediately the discussion of the second proposition, or the applicability of the commerce clause to that case.

If the court then meant to say that a tax levied on goods from a sister State which was not levied on goods of a similar character produced within the State, would be in conflict with the clause of the Constitution giving Congress the right "to regulate commerce among

the States," as much as the tax on foreign goods, then under consideration, was in conflict with the authority "to regulate commerce with foreign nations," we agree to the proposition.

It may not be inappropriate here to refer to the *License Cases,* (5 Howard, 504.)

The separate and diverse opinions delivered by the judges on that occasion leave it very doubtful if any material proposition was decided, though the precise point we have here argued was before the court and seemed to require solution. But no one can read the opinions which were delivered without perceiving that none of them held that goods imported from one State into another are within the prohibition to the States to levy taxes on imports, and the language of the Chief Justice and Judge McLean leave no doubt that their views are adverse to the proposition.

We are satisfied that the question, as a distinct proposition necessary to be decided, is before the court now for the first time.

But, we may be asked, is there no limit to the power of the States to tax the produce of their sister States brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory?

The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void. There is also, in addition to the restraints which those provisions impose by their own force on the States, the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another.

Judgment affirmed.

Mr. Justice NELSON, dissenting.

PEOPLE V. COMPAGNIE GENERALE TRANSATLANTIQUE.

Supreme Court of the United States. October, 1882
107 United States, 59.

Mr. Justice MILLER delivered the opinion of the court.

This was an action commenced by the People of the State of New York, in the Court of Common Pleas for the City and County of New York, to recover of the defendant the sum of one dollar for each alien passenger brought into New York by its vessels, for whom a tax had not been paid, with penalties and interest. The case was removed into the Circuit Court of the United States, which, on demurrer to the complaint, rendered a judgment in favor of the defendant. The plaintiff then brought this writ of error.

The tax in this case is demanded under sect. 1 of a statute of New York, passed May 31, 1881, entitled "An act to raise money for the execution of the inspection laws of the State of New York." The section thus reads:—

"Sect. 1. There shall be levied and collected a duty of one dollar for each and every alien passenger who shall come by vessel from a foreign port to the port of New York for whom a tax has not heretofore been paid, the same to be paid to the chamberlain of the City of New York by the master, owner, agent, or consignee of every such vessel within twenty-four hours after the entry thereof into the port of New York."

It has been so repeatedly decided by this court that such a tax as this is a regulation of commerce with foreign nations, confided by the Constitution to the exclusive control of Congress, and this court has so recently considered the whole subject in regard to similar statutes of the States of New York, Louisiana, and California, that unless we are prepared to reverse our decisions and the principles on which they are based, in the cases of *Henderson* v. *Mayor of New York* and *Chy Lung* v. *Freeman,* 92 U. S. 259, 275, there is little to say beyond affirming the judgment of the Circuit Court, which was based on those decisions.

The argument mainly relied on in the present case is that the new statute of New York, passed after her former statutes had been declared void in *Passenger Cases,* 7 How. 283, and in the recent case of *Henderson* v. *Mayor of New York,* is in aid of the inspection laws of the State. This argument is supposed to derive support from another statute passed three days earlier, entitled "An Act for the in-

spection of alien emigrants and their effects by the commissioners of emigration."

This act empowers and directs the commissioners of emigration "to inspect the persons and effects of all persons arriving by vessel at the port of New York from any foreign country, as far as may be necessary, to ascertain who among them are habitual criminals, or pauper lunatics, idiots, or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacity to support themselves and subject to become a public charge, and whether their persons or effects are affected with any infectious or contagious disease, and whether their effects contain any criminal implements or contrivances."

. . . .

We feel safe in saying that neither at the time of the formation of the Constitution nor since has any inspection law included anything but personal property as a subject of its operation. Nor has it ever been held that the words "imports and exports" are used in that instrument as applicable to free human beings by any competent judicial authority.

We know of nothing which can be exported from one country or imported into another that is not in some sense property,—property in regard to which some one is owner, and is either the importer or the exporter.

This cannot apply to a free man. Of him it is never said he imports himself, or his wife or his children.

The language of sect. 9, art. 1, of the Constitution, which is relied on by counsel, does not establish a different construction: "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

There has never been any doubt that this clause had exclusive reference to persons of the African Race. The two words "migration" and "importation" refer to the different conditions of this race as regards freedom and slavery. When the free black man came here, he migrated; when the slave came, he was imported. The latter was property, and was imported by his owner as other property, and a duty could be imposed on him as an import. We conclude that free human beings are not imports or exports, within the meaning of the Constitution.

In addition to what is said above, it is apparent that the object of

these New York enactments goes far beyond any correct view of the purpose of an inspection law. The commissioners are "to inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals, or pauper lunatics, idiots, or imbeciles, ... or orphan persons, without means or capacity to support themselves and subject to become a public charge."

It may safely be said that these are matters incapable of being satisfactorily ascertained by inspection.

What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever.

Another section provides for the custody, the support, and the treatment for disease of these persons, and the retransportation of criminals. Are these inspection laws? Is the ascertainment of the guilt of a crime to be made by inspection?

In fact, these statutes differ from those heretofore held void only in calling them in their caption "inspection laws," and in providing for payment of any surplus, after the support of paupers, criminals and diseased persons, into the treasury of the United States,—a surplus which, in this enlarged view of what are the expenses of an inspection law, it is safe to say will never exist.

A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title.

Since the decision of this case in the Circuit Court, Congress has undertaken to do what this court has repeatedly said it alone had the power to do. By the Act of August 3, 1882, c. 376, entitled "An Act to regulate immigration," a duty of fifty cents is to be collected for every passenger not a citizen of the United States who shall come to any port within the United States by steam or sail vessel from a foreign country, from the master of said vessel by the collector of customs. The money so collected is to be paid into the treasury of the United States, and to constitute a fund to be called the immigrant fund, for the care of immigrants arriving in the United States, and the relief of such as are in distress. The Secretary of the Treasury is charged with the duty of executing the provisions of the act and with supervision over the business of immigration. No more of the fund so raised is to be expended in any port than

is collected there. This legislation covers the same ground as the New York statute, and they cannot co-exist.

Judgment affirmed.

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3. *Tonnage Taxes.*

STATE TONNAGE TAX CASES.

Supreme Court of the United States. December, 1870.
12 Wallace, 204.

Mr. Justice CLIFFORD delivered the judgment of the court, giving an opinion in each of the cases.

I. IN THE FIRST CASE.

Assumpsit for money had and received is an appropriate remedy to recover back moneys illegally exacted by a collector as taxes in all jurisdictions where no other remedy is given, unless the tax was voluntarily paid or some statutory conditions are annexed to the exercise of the right to sue, which were unknown at common law.

Where the party assessed voluntarily pays the tax he is without remedy in such an action, but if the tax is illegal or was erroneously assessed, and he paid it by compulsion of law or under protest, or with notice that he intends to institute a suit to test the validity of the tax, he may recover it back in such an action, unless the legislative authority, in the jurisdiction where the tax was levied, has prescribed some other remedy or has annexed some other conditions to the exercise of the right to institute such a suit. (*Elliott* v. *Swartout,* 10 Peters, 150; *Bend* v. *Hoyt,* 13 id., 267.)

On the twenty-second of February, 1866, the legislature of Alabama passed a revenue act, and therein, among other things, levied a tax "on all steamboats, vessels, and other water-crafts plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage thereof," to be assessed and collected at the port where such vessels are registered, if practicable, otherwise at any other port or landing within the State where such vessel may be." (Sess. Acts 1846, p. 7.)

Five steamboats were owned by the plaintiffs, who were citizens of that State, doing business at Mobile under the firm name set forth in the record. All of the steamboats were duly enrolled and licensed in conformity to the act of Congress entitled "An act for enrolling and licensing ships and vessels to be employed in the coasting trade

of the United States," and the record shows that at the time the taxes, which are the subject of controversy, were imposed and collected, all those steamboats were engaged in the navigation of the Alabama, Bigbee, and Mobile Rivers, in the transportation of freight and passengers between the port of Mobile and other towns and landings on said rivers, within the limits of the State, the said rivers being "waters navigable from the sea by vessels of ten or more tons burden." (1 Stat. at Large, 77.)

Such steamboats are deemed ships and vessels of the United States, and as such are entitled to the privileges secured to such ships and vessels by the act of Congress providing for enrolling and licensing ships and vessels to be employed in that trade. (Ib. 305.)

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Demand of the taxes having been made by the collector, the plaintiffs protested that the same were illegal, but they ultimately paid the same to prevent the collector from seizing the steamboats and selling the same in case they refused to pay the amount. They paid the sum of two thousand eight hundred and forty-eight dollars and twenty-five cents as the amount of the taxes, fees, and expenses demanded by the defendant, and brought an action of assumpsit against the collector in the Circuit Court of the State for Mobile County to recover back the amount, upon the ground that the sum was illegally exacted. Judgment was rendered in that court for the plaintiffs, the court deciding that the taxes were illegal, as having been levied in violation of the Federal Constitution. Appeal was taken by the defendant to the Supreme Court of the State, where the parties were again heard, but the Supreme Court of the State, differing in opinion from the Circuit Court where the suit was commenced, rendered judgment for the defendant, whereupon the plaintiffs sued out a writ of error and removed the record into this court for re-examination.

I. Two principal objections were made to the taxes by the plaintiffs, as appears by the agreed statement, which is made a part of the record. (1) That the taxes as levied and collected were in direct contravention of the prohibition of the *Constitution*, that "no State shall, without the consent of Congress, levy any duty of tonnage," and the proposition of the plaintiffs was and still is that the act of the legislature of the State directs in express terms that such taxes shall be levied on all steamboats, vessels, and other water-crafts plying in the navigable waters of the State. (2) That the State law by levying the taxes violates the compact between the State and the United States, that "all navigable waters within the said State shall

forever remain public highways, free to the citizens of the said State and of the United States, without any tax, duty, impost, or toll therefor imposed by the said State." (3 Stat. at Large, 492.)

1. Congress has prescribed the rules of admeasurement and computation for estimating the tonnage of American ships and vessels. (13 Id. 70; Ib. 444.)

Viewed in the light of those enactments, the word tonnage, as applied to American ships and vessels, must be held to mean their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of one one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and of computation. (*Alexander* v. *Railroad,* 3 Strohbart, 598.)

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Taxes levied by a State upon ships and vessels owned by the citizens of the State *as property, based on a valuation of the same* as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying *any duty of tonnage,* without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or the citizens of another State, as the prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress. (*Gibbons* v. *Ogden,* 9 Wheaton, 202; *Sinnot* v. *Davenport,* 22 Howard, 238; *Foster* v. *Davenport,* Ib. 245; *Perry* v. *Torrence,* 8 Ohio, 524.)

Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question, but if the States, without the consent of Congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution. (*Passenger Cases,* 7 Howard, 447, 481.)

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Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the Constitution extends as fully to such duties if levied by the States as to duties on imports or exports, and for reasons quite as strong as those which induced the framers of the Constitution to withdraw imports and exports from State taxation. Measures, however, scarcely distinguishable from

each other may flow from distinct grants of power, as for example, Congress does not possess the power to regulate the purely internal commerce of the States, but Congress may enroll and license ships and vessels to sail from one port to another in the same State, and it is clear that such ships and vessels are deemed ships and vessels of the United States, and that as such they are entitled to the privileges of ships and vessels employed in the coasting trade. (1 Stat. at Large, 287; Ib. 305; 3 Kent, 11th ed. 203.)

Ships and vessels enrolled and licensed under that act are authorized to carry on the coasting trade, as the act contains a positive enactment that the ships and vessels it describes, and no others, shall be deemed ships or vessels of the United States entitled to the privileges of ships and vessels employed in the trade therein described. (*Gibbons* v. *Ogden* 9 Wheaton, 212.)

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Steamboats, as well as sailing ships and vessels, are required to be enrolled and licensed for the coasting trade, and the record shows that all the steamboats taxed in this case had conformed to all the regulations of Congress in that regard, that they were duly enrolled and licensed for the coasting trade and were engaged in the transportation of passengers and freight within the limits of the State, upon waters navigable from the sea by vessels of ten or more tons burden.

Tonnage duties, to a greater or less extent, have been imposed by Congress ever since the Federal government was organized under the Constitution to the present time. They have usually been exacted when the ship or vessel entered the port, and have been collected in a manner not substantially different from that prescribed in the act of the State legislature under consideration. Undisputed authority exists in Congress to impose such duties, and it is not pretended that any consent has ever been given by Congress to the State to exercise any such power.

If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express, but the attempt is made to show that the legislature in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats "as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties."

Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion con-

cedes what is obvious from the schedule, that the taxes are levied without regard to the value of the steamboats. But the proposition involved in the suggestion cannot be admitted, as by the very terms of the act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement and computation prescribed by the act of Congress.

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Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning. Taxes levied under an enactment which directs that a tax shall be imposed on steamboats at the rate of one dollar per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the steamboat as property. On the contrary the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are "plying in the navigable waters of the State," showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the State.

Such provision is much more clearly within the prohibition in question than the one involved in a recent case decided by this court, in which it was held that a statute of a State enacting that the wardens of a port were entitled to demand and receive, in addition to other fees, the sum of five dollars for every vessel arriving at the port, whether called on to perform any service or not, was both a regulation of commerce and a duty of tonnage, and that as such it was unconstitutional and void. (*Steamship Co.* v. *Port Wardens,* 6 Wallace, 34.)

Speaking of the same prohibition, the Chief Justice said in that case that those words in their most obvious and general sense describe a duty proportioned to the tonnage of the vessel—a certain rate on each ton—which is exactly what is directed by the provision in the tax act before the court, but he added that it seems plain, if the Constitution be taken in that restricted sense, it would not fully accomplish the intent of the framers, as the prohibition upon the States against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtless intended by the prohibition of any duty of tonnage. "It was not only a *pro rata* tax which was prohibited, but *any duty* on the ship, whether a fixed

sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."

Assume the rule to be as there laid down and all must agree that "the levy of the tax in question is expressly prohibited, as the schedule shows that it is exactly proportioned to the registered tonnage of the steamboats plying in the navigable waters of the State."

Strong as the language of the Chief Justice is in that case, it is no stronger than the language employed by the Supreme Court of the State to which this writ of error was addressed in the case of *Sheffield* v. *Parsons,* (3 Stewart & Porter, 304), in which the court in effect says that no tax, custom, or toll, can be levied "on the tonnage of any vessel, without the consent of Congress, for any purpose." Precisely the same rule was applied by that court to vessels duly enrolled and licensed for the coasting trade, and which were exclusively engaged in the towage and lighterage business in the bay and harbor of Mobile, carrying passengers and freight between the city and vessels at the anchorage below the bar. (*Lott* v. *Morgan,* 41 Alabama, 250.)

Some stress was laid in that case upon the circumstance that the vessels taxed were engaged in transporting cargoes to and from vessels engaged in foreign commerce, bound to that port, but it is quite clear that that circumstance is entitled to no weight, as the prohibition extends to *all ships and vessels* entitled to the privileges of ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different States or between different ports in the same State. (*People* v. *Saratoga & Rensselaer Railroad Company,* 15 Wendell, 131; *Steamboat Company* v. *Livingston,* 3 Cowen, 743.)

Formerly harbor-masters, at the port of Charleston, by an ordinance of that city, might exact one cent per ton, once in every three months, of every steam packet or other vessel from certain adjoining States trading steadily there and performing regular successive voyages to that port, but when the question came to be presented to the Court of Errors of that State, the judges unanimously held that the exaction was a duty on tonnage, and that, as such, the provision was unconstitutional and void. (*Alexander* v. *Railroad,* 3 Strohbart, 598.)

Taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation. (*Cooley* v. *Port Wardens,* 12 How. 314.)

Laws of that character are upheld as contemplating benefits and

advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned such laws where Congress has not legislated, but it is clear that such laws bear no relation to the act in question, as the act under consideration is emphatically an act to raise revenue to replenish the treasury of the State and for no other purpose, and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation.

Beyond question the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the shipowners, and consequently it cannot be upheld by virtue of the rules applied to the construction of laws regulating pilot dues and port charges. (*State* v. *Charleston,* 4 Rich. S. C. 286; *Benedict* v. *Vanderbilt,* 1 Robt. N. Y. 200.)

Attempt was made in the case of *Alexander* v. *Railroad,* to show that the form of levying the tax was simply a mode of assessing vessels as property, but the argument did not prevail, nor can it in this case, as the amount of the tax is measured by the tonnage of the steamboats and not by their value as property.

Reference is made to the case of the *Towboat Company* v. *Bordelon,* (7 Louisiana An. 195), as asserting the opposite rule, but the court is of a different opinion, as the tax in that case was levied, not upon the boat but upon the capital of the company owning the boat, and the court in delivering their opinion say the capital of the company is property, and the constitution of the State requires an equal and uniform tax to be imposed upon it with the other property of the State for the support of government.

For these reasons the court is of opinion that the State law levying the taxes in this case is unconstitutional and void, that the judgment of the State court is erroneous and that it must be reversed, and having come to that conclusion the court does not find it necessary to determine the other question.

JUDGMENT REVERSED with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

II. IN THE SECOND CASE.

Much discussion of the questions involved in this record will not be required, as they are substantially the same as those presented in the preceding case, which have already been fully considered and definitely decided.

. . . .

Bills of the taxes, it is alleged were rendered to the complainants,

but it is not necessary to enter into those details, except to say that the taxes were levied in the same form as in the preceding case, and the complainants allege that the respondent claims that he is authorized, in case they refuse to pay the taxes, to seize the respective steamboats, and that he may proceed, after twenty days' notice, to sell the same, or as much thereof as will pay the taxes, expenses and costs. They, the complainants, deny the legality of the taxes, and allege that the respondent, as such collector, threatens to seize the said steamboats and to proceed to sell the same to pay the taxes, expenses, and costs, which, they insist, would be contrary to equity. Being without any remedy at law, as they allege, they ask the interposition of a court of equity, and allege that the taxes are illegal.

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Different remedies are accorded to a complaining party in different jurisdictions for grievances such as the one set forth in the bill of complaint before the court. Usually preventive remedies are discountenanced as embarrassing to the just operations of the government, and the party taxed is required to pay the tax and seek redress in an action of assumpsit against the collector for money had and received. Decided cases may also be referred to where it is held that trespass will lie against the assessor, if it appear that the whole tax was levied without authority, as in that state of the case it is held that the assessor had no jurisdiction of the subject-matter. Preventive remedies, however, are accorded in some of the States, and in cases brought here by writ of error under the twenty-fifth section of the Judiciary Act, if no objection was taken in the court below to the form of the remedy employed, and none is taken in this court, it may safely be assumed that the proceeding adopted was regarded in the court below as an appropriate remedy for the alleged grievance. Doubts upon that subject cannot be entertained in this case, as the record shows that both courts heard and determined the case upon the merits, and all parties conceded throughout the litigation that the complainants were entitled to the relief prayed for in the bill of complaint, if the taxes were illegal, and the law levying the same was unconstitutional and void.

. . . .

State authority to tax ships and vessels, it is supposed by the respondent, extends to all cases where the ship or vessel is not employed in foreign commerce or in commerce between ports or places in different States. He concedes that the States cannot levy a duty of tonnage on ships or vessels if the ship or vessel is employed in foreign commerce or in commerce "among the States," but he denies

that the prohibition extends to ships or vessels employed in commerce between ports and places in the same State, and that is the leading error in the opinion of the Supreme Court of the State. Founded upon that mistake the proposition is that all taxes are taxes upon property, although levied upon ships and vessels duly enrolled and licensed, if the ship or vessel is not employed in foreign commerce or in commerce among the States.

Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of the United States entitled to the privileges secured to such vessels by the act for enrolling or licensing ships or vessels to be employed in the coasting trade.

Such a rule as that assumed by the respondent would incorporate into the Constitution an exception which it does not contain. Had the prohibition in terms applied only to ships and vessels employed in foreign commerce or in commerce among the States, his construction would be right, but courts of justice cannot add any new provision to the fundamental law, and, if not, it seems clear to a demonstration that the construction assumed by the respondent is erroneous.

Decree Reversed and the cause remanded for further proceedings in conformity to the opinion of this court.

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4. *Taxes on Exports.*

FAIRBANK V. UNITED STATES.

Supreme Court of the United States. April, 1901.
181 United States, 283.

On March 7, 1900, plaintiff in error was convicted in the District Court of the United States for the District of Minnesota on the charge of issuing as agent of the Northern Pacific Railway Company an export bill of lading upon certain wheat exported from Minnesota to Liverpool, England, without affixing thereto an internal revenue stamp, as required by the act of June 13, 1898, c. 448, 30 Stat. 448. Upon that conviction he was sentenced to pay a fine of \$25. His contention on the trial was that that act, so far as it imposes a stamp tax on foreign bills of lading, is in conflict with art. I, section 9, of the Constitution of the United States, which reads:

"No tax or duty shall be laid on articles exported from any State." This contention was not sustained by the trial court, and this writ of error was sued out to review the judgment solely upon the foregoing constitutional question.

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Mr. Justice BREWER, after stating the case, delivered the opinion of the court.

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If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be equally enforced in its spirit and to its entirety. . . . . .

. . . .

The constitutional provision is "no tax or duty shall be laid on articles exported from any State." The statute challenged imposes on "bills of lading for any goods, merchandise or effects, to be exported from any port or place, ten cents." The contention on the part of the Government is that no tax or duty is placed upon the article exported; that so far as the question is in respect to what may be exported and how it should be exported, the statute, following the Constitution, imposes no restriction; that the full scope of the legislation is to impose a stamp duty on a document not necessarily though ordinarily used in connection with the exportation of goods; that it is a mere stamp imposition on an instrument, and, similar to many such taxes as are imposed by Congress, by virtue of its general power of taxation, not upon this alone, but upon a great variety of instruments used in the ordinary transactions of business. On the other hand, it is insisted that though Congress by virtue of its general taxing power may impose stamp duties on the great bulk of instruments used in commerce, yet it cannot in the exercise of such power interfere with that freedom from governmental burden in the matter of exports which it was the intention of the Constitution to protect and preserve. It must be noticed that by this act of 1898 while a variety of stamp taxes are imposed, a discrimination is made between the tax imposed upon an ordinary internal bill of lading and that upon one having respect solely to matters of export. An ordinary bill of lading is charged one cent; an export bill of lading ten cents. So it is insisted that there was not

simply an effort to place a stamp duty on all documents of a similar nature but by virtue of the difference an attempt to burden exports with a discriminating and excessive tax.

The requirement of the Constitution is that exports should be free from any governmental burden. The language is "no tax or duty." Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it is one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and as in accordance with the rules heretofore noticed the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed. If, for instance, Congress may place a stamp duty of ten cents on bills of lading on goods to be exported it is because it has power to do so, and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution.

The power to tax is the power to destroy. And that power can be exercised not only by a tax directly on articles exported, but also and equally by a stamp duty on bills of lading evidencing the export. . . . . . The question of power is not to be determined by the amount of the burden attempted to be cast. The constitutional language is "no tax or duty." A ten cent tax or duty is in conflict with that provision as certainly as an hundred dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount but one of power. The applicable maxim is "*obsta principiis*," not "*de minimis non curatur lex*."

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If all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation, and, as we have shown, a stamp tax on a bill of lading, which evidences the export, is just as clearly a burden on the ex-

portation as a direct tax on the article mentioned in the bill of lading as the subject of the export.

In *Nicol* v. *Ames,* 173 U. S. 509, we had occasion to consider this very act in reference to another stamp duty. . . . . . We sustained that tax as a tax upon the privilege or facilities obtained by dealings on exchange, saying (p. 521):

"A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property."

If it be true that a stamp tax required upon every instrument evidencing a sale is really and practically a tax upon the property sold, it is equally clear that a stamp duty upon foreign bills of lading is a tax upon the articles exported.

These considerations find ample support in prior adjudications of this court. Thus, in *Almy* v. *California,* 24 How. 169, 174; it appeared that the State of California had imposed a stamp tax on bills of lading for gold or silver shipped to any place outside of the State, and the contention was that such stamp tax was not a tax on the goods themselves, but the court said:

"But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading or some written instrument of the same import is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco or bagging to cover cotton when such articles are exported to a foreign country; for no one would put his property in the hands of a ship master without taking written evidence of its receipt on board the vessel and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo of what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is a duty on the article exported."

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On the other hand, *Pace* v. *Burgess, Collector,* 92 U. S. 372, is cited as an authority against these conclusions; but an examination

of the case shows that this is a mistake. The act of 1868, 15 Stat. 125, imposed certain taxes on the manufacture of tobacco for consumption or use, required as evidence of the payment of such taxes the affixing of revenue stamps to the packages, and forbade the removal of any tobacco from the factory without payment of the taxes and affixing of the stamps. It further provided that tobacco might be manufactured for export and exported without payment of any tax. . . . "The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under the pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. The point to guard against is, the imposition of a duty under the pretext of fixing a fee. In the case under consideration, having due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government.

"One cause of difficulty in the case arises from the use of stamps as one of the means of segregating and identifying the property intended to be exported. It is the form in which many taxes and duties are imposed and liquidated; stamps being seldom used except for the purpose of levying a duty or tax. But we must regard things rather than names. A stamp may be used, and, in the case before us we think it is used for quite a different purpose than that of imposing a tax or duty; indeed, it is used for the very contrary purpose— that of securing exemption from a tax or duty. The stamps required by recent laws to be affixed to all agreements, documents and papers, and to different articles of manufacture, were really and in truth taxes and duties, and were intended as such. The stamp required to be placed on gold dust exported from California by a law of that State was clearly an export tax, as this court decided in the case of *Almy* v. *The State of California,* 24 How. 169. In all such cases no one could entertain a reasonable doubt on the subject."

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Another matter pressed upon our attention, which deserves and has

received careful consideration, is the practical construction of this constitutional provision by legislative action.

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From this *résumé* of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful.

We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration, and in doubtful cases will, as we have shown, often turn the scale; but when the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged. It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the recent statute of 1898. It must be borne in mind also, in respect to this matter that during the first period exports were limited, and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.

Without enlarging further on these matters, we are of opinion that a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in that bill of lading, and, therefore, a tax or duty on exports, and in conflict with the constitutional prohibition. The judgment of the District Court will be reversed and the case remanded with instruction to grant a new trial.

Mr. Justice HARLAN (with whom concurred Mr. Justice GRAY, Mr. Justice WHITE and Mr. Justice McKENNA,) dissenting.

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III. Due Process of Law and Equal Protection of the Laws.

1. Hearing Necessary.

COUNTY OF SAN MATEO V. SOUTHERN PACIFIC R. R. CO.

United States Circuit Court, District of California. September 25, 1882. 13 Federal Reporter 722.

Field, Justice. This action is brought to recover of the Southern Pacific Railroad Company, a corporation formed under the laws of California, certain state and county taxes levied upon its property for the fiscal year of 1881 and 1882, alleged to be due to the plaintiff, with 5 per cent added for their non-payment, and interest. It was commenced in one of the superior courts of the state, and, on application of the defendant, was removed to this court.

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The railroad company contends that the taxes are invalid and void on two grounds: . . . . .

(2) Because the assessment was made in pursuance of provisions of the state constitution, which gave no notice to the company, and afforded it no opportunity to be heard respecting the value of the property, or for the correction of any errors of the board, thus depriving it of its property without due process of law guaranteed by [the fourteenth amendment of the United States Constitution.]

. . . .

The Political Code provides that the assessment shall be made by the state board on or before the first Monday in May of each year; that the president, secretary cashier, or managing agent, or such officer of the corporation as the board may designate, shall furnish to the board, on or before the first Monday of April of the year, a statement, signed and sworn to by him, showing in detail the whole number of miles of railway owned, operated, or leased in the state by the corporation, and the value thereof per mile, and all its property of every kind located in the state, the number and value of its engines, passenger, mail, express, baggage, freight, and other cars, or property used in operating or repairing the railway in the state, and on railways which are parts of lines extending beyond its limits, the amount of the rolling stock in use during the year, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in the state, and such other facts as the board

may in writing require; and that if the officer or officers designated fail to make and furnish such statement, the board shall proceed to assess the property; and the valuation fixed shall be final and conclusive. . . . . .

We have no doubt that further legislation might have been adopted providing for notice to the company, and a system of procedure by which it might have been heard respecting the assessment. We do not understand that the supreme court of the state intended by the decision cited (*People* v. *Sup'rs of Sacramento County,* 8 Pac. Law. J. 103) to hold that the tenth section of the thirteenth article is self executing, except to the extent that it vests complete power in the state board to make the assessment of the property; nor that legislation may not be had providing for the mode in which the powers of the board shall be exercised. Indeed, the concluding section of the article authorizes any legislation necessary to give effect to its provisions. Unfortunately, no such legislation has been had. The attempted legislation failed, because it did not receive in the legislature the constitutional majority, as is clearly shown by the circuit judge in his opinion. It is unnecessary to go over the ground he has completely covered.

The presentation to the state board by the corporation of a statement of its property and of its value, which it is required to furnish, is not the equivalent to a notice of the assessment made and of an opportunity to be heard thereon. It is a preliminary proceeding, and until the assessment the corporation cannot know whether it will have good cause of complaint. No hearing upon the statement presented is allowed, and when the assessment is made the matter is closed; no opportunity to correct any errors committed is provided. The presentation of the statement can no more supersede the necessity of allowing a subsequent hearing of the owners, than the filing of a complaint in court can dispense with the right of the suitor and his contestant to be there heard.

There being, then, no provisions of law giving to the company notice of the action of the state board, and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the company's property in the enforcement of the tax levied according to the assessment be depriving it of its property without due process of law? It seems to us that there can be but one answer to these questions. There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording him an opportunity of being heard respect-

ing the correctness of their action. And the injustice is strikingly apparent when the property consists of the great number of particulars which go to make up the taxable estate of a railroad company, requiring for any just estimate of their value accurate knowledge upon a multitude of subjects, not usually possessed without special study. We cannot assent to any such doctrine. It conflicts with the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty, or his property without an opportunity of being heard against the proceeding. The principle is as old as *Magna Charta,* and is embodied in all the state constitutions, and in the fourteenth amendment of the federal Constitution. The provision in this amendment is in the form of an interdict upon the states—"Nor shall any state deprive any person of life, liberty, or property without due process of law." And by due process is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law. It must be adapted to the ends to be attained; and it must give to the party to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but due process. If it touched life or liberty, it would be wanton punishment, or rather wanton cruelty; if it touched property, it would be arbitrary exaction. It is significant that the guaranty against the deprivation of property without due process of law is contained in the clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the securities applicable to the case recognized by the general law, by those principles which are established in all constitutional governments for the protection of private rights. Notice is absolutely essential to the validity of the proceeding in any case; it may be given by personal citation, and in some cases it may be given by statute; and given it must be in some form. If life and liberty are involved, there must be a regular course of judicial proceedings; so, also, where title or possession of property is in contention. But in the taking of property by taxation the proceeding is more summary and stringent. The necessities of revenue for the support of government will not admit of the delays attendant upon judicial proceedings in the courts of justice. The statute fixes the rate of taxation upon the value of the property, and appoints officers to estimate and appraise the value. Due process of law in the proceeding is deemed to be pursued, when after assessment is made by the assessing officers upon such informa-

tion as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient, if the time and place be designated by statute. But whatever the character of the proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding.

In *Davidson* v. *New Orleans,* the Supreme Court of the United States assumed this position to be unquestionable. In that case an assessment levied upon certain real estate in New Orleans for draining the swamps of that city was resisted on the ground that the proceeding deprived the owners of their property without due process of law; and the court refused to disturb it for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the courts. After stating that much misapprehension prevailed as to the meaning of the terms "due process of law," and that it would be difficult to give a definition which would at once be perspicuous, comprehensive, and satisfactory, the courts, speaking through Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case:

"That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or for some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary course of justice, with notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." 96 U. S. 104.

In *Stuart* v. *Palmer* the meaning of these terms is elaborately considered by the court of appeals of New York with reference to numerous adjudications on the subject. In that case a law of the state imposed an assessment on certain real property for a local improvement without notice to the owner, and a hearing or an opportunity

to be heard by him, and the court held that it had the effect of depriving him of his property without due process of law, and was therefore unconstitutional. Mr. Justice Earl, speaking for the court, said:

"I am of the opinion that the constitution sanctions no law imposing such an assessment without a notice to, and a hearing, or an opportunity of hearing, by the owners of the parcel to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them a right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutionality of a law is to be tested, not by what has been done under it, but what may, by its authority, be done. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice." And, again, that "no case, it is believed, can be found in which it was decided that this constitutional guaranty (against depriving one of his property without due process of law) did not extend to cases of assessments; and yet we may infer, from certain *dicta* of judges, that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also; and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment." 74 N. Y. 188, 195.

We concur fully in the views thus forcibly expressed.

. . . .

We have already extended this opinion to a great length, and we do not think it necessary or important to notice other positions urged by counsel with great learning and ability against the validity of the taxes for which the present action is brought We are satisfied that the assessment upon which they were levied is invalid and void, and judgment must accordingly be entered on the demurrer for the de-

fendant, and, by stipulation of parties, the judgment must be made final.

See also Matter of McPherson, 104 N. Y. 306, *infra*. But a hearing prior to the assessment of the tax would not seem to be necessary in the case of specific taxes such as licenses taxes. See McMillen v. Anderson 95 U. S. 37 *infra*.

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2. Vested Rights.

ORR V. GILMAN.

Supreme Court of the United States. October, 1901.
183 United States, 278.

Mr. Justice SHIRAS delivered the opinion of the court.

This is the case of a so-called transfer tax imposed under the laws of the State of New York. The various contentions of the plaintiffs in error, attacking the validity of the tax, were overruled by the courts of the State, and the cause is now before us on the general proposition that by the proceedings the plaintiffs in error, or those whom they represent as trustees and guardians, have been deprived of the equal protection of the laws of the State of New York, their privileges and immunities as citizens of the United States having been abridged, and their property taken without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and likewise, as to a portion of the property affected, in violation of section 10 of article 1 of the Constitution of the United States.

The first question presented arises out of subdivision 5 of section 220 of the tax law of the State of New York, which reads as follows:

"5. Whenever any person, or corporation, shall exercise a power of appointment, derived from any disposition of property, made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer, taxable, under the provisions of this act, in the same manner as though the property, to which such appointment relates, belonged absolutely to the donee of such power, and had been bequeathed, or devised, by such donee by will; and whenever any person, or corporation, possessing such a power of appointment, so derived, shall omit, or fail, to exercise the same within the time provided therefor, in whole or in part, a transfer, taxable under the provisions of this act, shall be deemed to take place to the

extent of such omissions, or failure, in the same manner as though the persons, or corporations, thereby becoming entitled to the possessions, or enjoyment of the property to which such power related, had succeeded thereto, by a will of the donee, of the power failing to exercise such power, taking effect at the time of such omission, or failure."

This enactment became a law on April 16, 1897. David Dows, Senior, died March 30, 1890, leaving a will containing a power of appointment to his son, David Dows, Junior, which will was duly admitted to probate by the Surrogate's Court on April 14, 1890. David Dows, Junior, died on January 13, 1899, leaving a will, in which he exercised the power of appointment given him in the will of his father, and apportioned the property, which was the subject of the power, among his three sons, who are represented in this litigation by the plaintiff in error.

It is claimed that, under the law of the State of New York as it stood at the time of his death, in 1890, David Dows, Senior, had a legal right to transfer, by will, his property or any interest therein, to his grandchildren, without any diminution, or impairment, then imposed by the law of the State upon the exercise of that right; that his said grandchildren acquired vested rights in the property so transferred, and that the subsequent law, whose terms have been above transcribed, operates to diminish and impair those vested rights. In other words, it is claimed that it is not competent for the State, by a subsequent enactment, to exact a price or charge for a privilege lawfully exercised in 1890, and to thus take from the grandchildren a portion of the very property the full right to which had vested in them many years before.

We here meet, in the first place, the question of the construction of the will of David Dows, Senior. Under and by virtue of that will, did the property, whose transfer is taxed, pass to and become vested in the grandchildren, or did the property not become vested in them until and by virtue of the will of David Dows, Junior, exercising the power of appointment? The answer to be given to this question must, of course, be that furnished us by the Court of Appeals in this case. *Matter of Dows,* 167 N. Y. 227:

"Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that, in reality and substance, it is the execution of the power that gives the grantee the property passing under it. The will of Dows, Senior, gave his son a power of appointment, to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the Supreme

Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the State, which it may tax or charge for, it follows that the request of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the State. When David Dows, Senior, devised this property to the appointees under the will of his son he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will."

It will be seen that, in putting this construction upon the will of David Dows, Senior, the Court of Appeals not merely construed the words of the will but, by implication, applied to the case the provisions of subdivision 5 of section 220, under which the transfer tax in question was imposed, and thus construed the tax law and affirmed its validity.

While it is settled law that this court will follow the construction put by the State courts upon wills devising property situated within the State, and while it is also true that we adopt the construction of its own statutes by the State courts, a question may remain whether the statute, as so construed, imports a violation of any of the rights secured by applicable provisions of the Constitution of the United States. And such is the contention here.

This court has no authority to revise the statutes of New York upon any grounds of justice, policy or consistency to its own constitution. Such questions are concluded by the decision of the legislative and judicial authorities of the State.

In *Carpenter* v. *Pennsylvania,* 17 How. 456, the question arose as to the validity, in its Federal aspect, of a law of the State of Pennsylvania imposing an inheritance tax on personal property which had passed into the possession of an executor before the passage of the act, and which was held by him for the purpose of distribution among the legatees, who were collateral relatives to the decedent. The act was held valid by the Supreme Court of the State, and was brought up to this court by a writ of error, where it was contended that such an act was in its nature an *ex post facto* law, which took the property of an individual to the use of the State, because of a fact which had occurred prior to the passage of the law, and also that the law, in its retroactive effect, impaired the obligation of a contract, in that it was alleged to absolve the executor from his contract, implied in law, to pay over the legacies to those entitled to them, just to the

extent that the law required him to pay to the State. The opinion of the court, delivered by Mr. Justice Campbell, was, in part, as follows:

"The validity of the act, as affecting successions to open after its enactment, is not contested; nor is the authority of the State to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied. But the complaint is that the application of the act to a succession already in the course of settlement, and which had been appropriated by the last will of decedent, involved an arbitrary change of the existing laws of inheritance to the extent of this tax, in the sequestration of that amount for the uses of the State; that the rights of the residuary legatees were vested at the death of the testator, and from that time those persons were non-residents, and the property taxed was also beyond the State; and that the State has employed its power over the executor and the property within its borders, to accomplish a measure of wrong and injustice; that the act contains the imposition of a forfeiture or penalty, and is *ex post facto*.

"It is, in some sense, true that the rights of donees under a will are vested at the death of the testator; and that the acts of administration which follow are conservatory means, directed by the State to ascertain those rights, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this would justify criticism, and perhaps censure. But, until the period for distribution arrives, the law of the decedent's domicil attaches to the property, and all other jurisdictions refer to the place of the domicil as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property, by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities and administrative control, prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution. If the State, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it. *Ennis* v. *Smith,* 14 How. 400."

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It is true that this case was decided before the adoption of the

Fourteenth Amendment, but we think it correctly defined the limits of jurisdiction between the state and Federal governments in respect to the control of the estates of decedents, both as they were regarded before and have been regarded since the adoption of the Fourteenth Amendment. It has never been held that it was the purpose or function of that amendment to change the systems and policies of the States in regard to the devolution of estates, or to the extent of the taxing power over them.

. . . .

In the light of the principles thus established we are unable to see in this legislation of the State of New York, as construed by its highest court, any infringement of the salutary provisions of the Fourteenth Amendment. There are involved no arbitrary or unequal regulations, prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation are applied to the lawful uses of the State, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation.

. . . .

Another objection made to the judgment of the Court of Appeals, affirming the Surrogate's order, is that the tax imposed upon transfers made under a power of appointment is a tax upon property and not on the right of succession, and that, as a portion of the fund was invested in incorporated companies liable to taxation on their own capital, and in certain bonds of the State of New York, and in bonds of the city of New York exempt by statute from taxation, such exemption formed part of the contract under which said securities were purchased, and the tax imposed and the proceedings to enforce it were in violation of section 10 of article 1 of the Constitution of the United States forbidding the States to pass laws impairing the obligation of contracts.

The Court of Appeals overruled the proposition that the transfer tax in question was a tax upon property and not upon the right of succession, and held that when David Dows, Senior, devised this property to the appointees under the will of his son he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will and that the charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will.

In reaching this conclusion the Court of Appeals cited not only various New York cases but several decisions of this court, the principles of which were thought to be applicable. *Magoun* v. *Illinois Trust Co.,* 170 U. S. 283; *Plummer* v. *Coler,* 178 U. S. 115; *Knowlton* v. *Moore,* 178 U. S. 41; *Murdock* v. *Ward,* 178 U. S. 139.

We think it unnecessary to enter upon another discussion of a subject so recently considered in the cases just cited, and that it is sufficient to say that, in our opinion, the Court of Appeals did not err when it held that a transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the State, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the Constitution of the United States.

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The judgment of the Court of Appeals of the State of New York affirming the judgment of the Surrogate's Court of New York County is

Affirmed.

Mr. Justice HARLAN concurred in the result.

See matter of Peel, 171 N. Y. 48, *infra*. Where the time of the transfer is not fixed by statute the transfer under a power of appointment in a will takes place at the time of the death of the decedent. Matter of Stewart, 131 N. Y. 274. Here a power of appointment was exercised so as to rest an estate in the direct heirs of the person exercising the power, who were collaterals of the decedent. They had to pay a collateral succession tax. See also Com. v. Williams' Executors, 13 Pa. St. 29.

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3. Equal Protection of the Laws.

COUNTY OF SANTA CLARA V. SOUTHERN PACIFIC R. R. CO.

United States Circuit Court, District of California. September, 1883. 18 Federal Reporter 385.

FIELD, Justice. These are actions for the recovery of unpaid state and county taxes levied upon certain property of the several defendants, either for the fiscal year of 1881 or of 1882, and alleged to be due to the plaintiffs, with an additional 5 per cent as a penalty for their non-payment and interest.

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. . . . . We shall confine ourselves to the defenses made to the assessment and tax from the alleged conflict of the provisions

under which they were levied, with the requirements of the fourtenth amendment to the Constitution of the United States, which declares that no state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The railroad companies contend that both inhibitions of this amendment were violated in the assessment and taxation of their property.

The constitution of California provides for taxes on property, on incomes, and on polls. The taxation on property, with which alone we are concerned in this case, is to be in proportion to its value. There is no provision for levying a specific tax upon any article or kind of property. It declares that all property, not exempt under the laws of the United States, shall, with some exceptions, be taxed according to its value, to be ascertained as prescribed by law; and that the word "property" shall "include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

It also declares that "a mortgage, deed of trust, contract, or other obligation by which a debt is secured, *shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby.*" And that, *"except as to railroad and other quasi public corporations,* in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof."

. . . .

. . . . . In fixing . . . the liabilities of parties to pay the tax assessed and levied upon property subject to a mortgage, and in estimating the value of such properties as the foundation for the tax, a discrimination is made between the property held by railroad and *quasi* public corporations, and that held by natural persons and other corporations. A mortgage, as seen by the provisions of the constitution above quoted, is deemed and treated, for the purposes of assessment and taxation, as an interest in the property affected. At common law a mortgage of property is a conveyance of the title, subject to a condition that if the debt secured be paid as stipulated, the conveyance is to become inoperative. Until the debt secured is paid, the title is in the mortgagee. By the constitution, a mortgage, for the purposes of assessment and taxation, operates in like manner to transfer the mortgagor's interest to the extent represented by the amount secured. If such amount be half the value of the property,

the taxable interest of the mortgagee is an undivided half interest in the property. If the amount equal or exceed the whole value of the property, the taxable interest of the mortgagee embraces the entire property. The value of the security can never exceed the value of the property mortgaged; it mav be less, and is so if the amount secured be less than such value.

Now, under the constitution, when, by the execution of a mortgage, a taxable interest in the property held by natural persons, or by corporations other than railroads or *quasi* public, is transferred by the owner to another party, or the whole taxable interest is vested in him, the holder alone of such interest is taxed for it. It is assessed against him as the owner of it, and against him alone could it be justly assessed. But when, by a mortgage on the property of a railroad or *quasi* public corporation, a taxable interest in such property is transferred by the corporation to another, or the whole interest is vested in him, the holder of such interest is exempted from taxation for it, and the corporation is assessed and taxed for it notwithstanding the transfer. No account is taken of the transfer of the taxable interest in the estimate of the value of the property. It is still assessed and taxed to the original holder.

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Under the provisions of the constitution, the property of the several railroad companies, defendants in these cases, was assessed and taxed, and in such assessment and taxation all the injurious discriminations mentioned were applied against the companies. . . . .

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The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration in assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value,—at a half or a quarter of it,—and the property of another at more than its value,—at double or treble of it,—according to the will or caprice of the state. To-day railroad companies are under its ban, and the discrimination is against their property. To-morrow it may be that other institutions will incur its displeasure. If the property of railroad companies may be thus sought out and subjected to discriminating taxation, so, at the will of the state, by a change of its constitution, may the property of churches, of universities, of asylums, of savings banks, of insurance companies, of rolling and flouring mill companies, of mining companies, indeed, of any corporate companies existing in the state. The principle which justifies such a discrimination in assessment and taxation,

where one of the owners is a railroad corporation and the other a natural person, would also sustain it where both owners are natural persons. A mere change in the state constitution would effect this if the federal constitution does not forbid it. Any difference between the owners, whether of age, color, race, or sex, which the state might designate, would be a sufficient reason for the discrimination. It would be a singular comment upon the weakness and character of our republican institutions if the valuation and consequent taxation of property could vary according as the owner is white, or black, or yellow, or old, or young, or male, or female. A classification of values for taxation upon any such ground would be abhorrent to all notions of equality of right among men. Strangely, indeed, would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities; and so on, making a discrimination wherever there was any difference in the character or pursuit or condition of the owner. To levy taxes upon a valuation of property thus made is of the very essence of tyranny, and has never been done except by bad governments in evil times, exercising arbitrary and despotic power.

Until the adoption of the fourteenth amendment there was no restraint to be found in the constitution of the United States against the exercise of such power by the states. . . . . .

The first section of the fourteenth amendment places a limit upon all the powers of the state, including among others, that of taxation. After stating that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state in which they reside, it declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any *person* (dropping the designation 'citizen') of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The amendment was adopted soon after the close of the civil war, and undoubtedly had its origin in a purpose to secure the newly-made citizens in the full enjoyment of their freedom. But it is in no respect

limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color, within the jurisdiction of the states throughout the broad domain of the republic. A constitutional provision is not to be restricted in its application because designed originally to prevent an existing wrong.

. . . .

With the adoption of the amendment the power of the states to oppress any one under any pretense or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. . . . . .

Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world. . . . . .

. . . .

The fact to which counsel allude, that certain property is often exempted from taxation by the states, does not at all militate against this view of the operation of the fourteenth amendment in forbidding the imposition of unequal burdens. Undoubtedly, since the adoption of that amendment, the power of exemption is much more restricted than formerly; but that it may be extended to property used for objects of a public nature is not questioned,—that is, where the property is used for the promotion of the public well-being and not for any private end. . . . . .

That the proceeding by which the taxes claimed in these several actions were levied against the railroad companies on taxable inter-

ests with which they had parted was not due process of law, seems to me so obviously true as to require no further illustration. . . .

To justify these discriminating provisions, and maintain the action in face of them, the plaintiffs have taken positions involving doctrines which sound strangely to those who have always supposed that the constitutional guaranties extend to all persons, whatever their relations, and protect from spoliation all property, by whomsoever held. These positions are substantially as follows: That persons cease to be within the protection of the fourteenth amendment, and as such entitled to the equal protection of the laws, when they become members of a corporation; that property, when held by persons associated together in a corporation, is subject to any disposition which the state may, at its will, see fit to make; that, in any view, the property upon which the taxes claimed were levied was classified by its use, taken out of its general character as real and personal property, and thus lawfully subjected to special taxation; and that the power of the state cannot be questioned by the Southern Pacific Railroad Company by reason of the covenant in its mortgage. These positions are not advanced by counsel in this language, nor with the baldness here given; but they mean exactly what is here stated, or they mean nothing, as will clearly appear when we analyze the language in which they are presented.

Private corporations—and under this head, with the exception of sole corporations, with which we are not now dealing, all corporations other than those which are public are included—private corporations consist of an association of individuals united for some lawful purpose, and permitted to use a common name in their business and have succession of membership without dissolution. . . . The members do not, because of such association, lose their rights to protection, and equality of protection. They continue, notwithstanding, to possess the same right to life and liberty as before, and also to their property, except as they may have stipulated otherwise. As members of this association—of the artificial body, the intangible thing, called by a name given by themselves—their interests, it is true, are undivided, and constitute only a right during the continuance of the corporation to participate in its dividends, and on its dissolution, to a proportionate share of its assets; but it is property, nevertheless, and the courts will protect it, as they will any other property, from injury or spoliation.

Whatever affects the property of the corporation—that is, of all the members united by the common name—necessarily affects their interests. . . . . . So, therefore, whenever a provision of the

constitution or of a law guaranties to persons protection in their property, or affords to them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to the corporations; not to the name under which different persons are united, but to the individuals composing the union. The courts will always look through the name to see and protect those whom the name represents. . . . . .

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But it is urged that even with an admission of these positions, property may be divided into classes and subjected to different rates; that such classification may be made from inherent differences in the nature of different parcels of property, and also from the different uses to which the same property may be applied; and it is sought to place the tax levied in these cases under one of these heads. As already mentioned, the constitution of the state provides with respect to property that it shall be taxed in proportion to its value; it provides for no specific tax upon any article. The classification of property, either from its distinctive character or its peculiar use, must be made within the rule prescribing taxation according to value Real and personal property, differing essentially in their nature, may undoubtedly be subjected to different rates; real property may be taxed at one rate, personal property at another. But in both cases the taxes must bear a definite proportion to the value of the property. So, also, if use be the ground of classification, for which a different rate of taxation is prescribed, the rate must still bear a definite proportion to the value. Now, there is no difference in the rate of taxation prescribed by the law of the state for the property of railroad corporations and that prescribed for the property of individuals. There is only one rate prescribed for all property. There is, therefore, as said in the *San Mateo Suit,* no case presented for the application of the doctrine of classification, either from the peculiar character of railroad property or its use.

The ground of complaint is not that any different rate of taxation is adopted,—for there is none,—but that a different rule is followed in ascertaining the value of the property of railroad corporations, as a basis of taxation, from that followed in ascertaining the value of property held by natural persons. In estimating the value in one case, certain elements are considered, by which the value as a basis for taxation is lessened; in estimating the value in another case, those elements are omitted, by which the valuation is proportionately increased. All property of railroad corporations, whether used in connection with the operation of their roads or entirely distinct from

any such use, is estimated without regard to any mortgages thereon, while the property of natural persons is valued with a deduction of such mortgages. . . . . .

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It follows from the views expressed that findings must be had for the defendants, and judgment in their favor entered thereon.

Although corporations are persons they are not citizens and are not therefore entitled to the privileges and immunities of citizens; Paul v. Virginia, 8 Wallace (U. S.) 183.

MAGOUN V. ILLINOIS TRUST AND SAVINGS BANK.

Supreme Court of the United States. October, 1897.
170 United States 283.

Mr. Justice McKENNA, after stating the case delivered the opinion of the court.

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This brings us to the law in controversy. The appellant attacks both its principles and its provisions—its principles as necessarily arbitrary and its provisions as causing discriminations and creating inequality in the burdens of taxation.

Is the act open to this criticism? The clause of the Fourteenth Amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it "only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances." *Kentucky Railroad Tax Cases,* 115 U. S. 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes* v. *Missouri,* 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness or unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illus-

tration it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said, in *Mobile County* v. *Kimball,* 102 U. S. 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive State legislation. And he observed in another case: "It is hardly necessary to say that hardship, impolicy or injustice of State laws is not necessarily an objection to their constitutional validity."

The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B, *Missouri Pacific Railway* v. *Mackey,* 127 U. S. 205, to a different measure of damages than B, *Minneapolis and St. Louis Railway* v. *Beckwith,* 129 U. S. 26, and it permits special legislation in all of its varieties. *Missouri Pacific Railway* v. *Mackey,* 127 U. S. 205; *Minneapolis and St. Louis Railway* v. *Herrick,* 127 U. S. 210; *Duncan* v. *Missouri,* 152 U. S. 377.

In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course, "Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition," said Mr. Justice Bradley, in *Bell's Gap Railroad* v. *Pennsylvania,* 134 U. S. 232, 237.

And Mr. Justice Brewer, in *Gulf, Colorado & Santa Fe Railway* v. *Ellis,* 165 U. S. 150, 165, after a careful consideration of many cases, said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Two principles, therefore, must be reconciled in the Illinois inheritance law if it is to be sustained, the equality of protection of the

laws guaranteed by the Fourteenth Amendment, and the power of the State to classify persons and property. The latter principle needs further consideration. What test is there of the reasonableness of a classification—of one based upon "some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection?" Legislation special in character is not forbidden by it, as we have seen. Treating mechanics as a class, and giving them a lien for the amount of their work, has been held reasonable. Charging a railroad corporation and not other corporations or persons with an attorney's fee has been held unreasonable, yet the former would seem to be as much an exclusive favor as the latter an exclusive burden.

Of taxation, and the case at bar is of taxation, Mr. Justice Bradley said in the *Bell's Gap Railroad* v. *Pennsylvania,* 134 U. S. 232, and Mr. Justice Fuller in *Giozza* v. *Tiernan,* 148 U. S. 657, that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation.

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There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons or things. Bearing these considerations in mind we can solve the questions in controversy.

There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship, to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, therefore, depend upon substantial differences, differences which may distinguish them from each other and them or either of them from the other class—differences, therefore, which "bear a just and proper relation to the attempted classification"—the rule expressed in the *Gulf, Colorado & Santa Fe Railway* v. *Ellis,* 165 U. S. 150. And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates "equally and uniformly upon all persons in similar circumstances."

But the appellant asserts discrimination, and claims that the exemptions produce the greatest inequality. As stated above, the Supreme Court of the State of Illinois passed on and sustained the law in the *Drake Case,* and claiming the opinion for support, the

appellant contends that there are two distinct systems and principles applied in the act, the one basing the tax on the amount received or the value of the privilege of succession; the other basing the tax upon the estate owned by the decedent, irrespective of the amount or value of the legacy. And discriminations hence resulting, or rather which are claimed as hence resulting, are detailed.

We, however, do not read the opinion as counsel do. In answer to the objection that the statute offended against uniformity or proportion to valuation as prescribed by the constitution of Illinois, the court said:

"That statute provides certain classes of property, which were a part of an estate, shall be exempt from taxation under these provisions; and when the legislature provides other classes of property, some of which shall pay one dollar per hundred, others two, others three and others four, and still others five, and again others six dollars per hundred, six different classes are created under and by which a tax is levied by valuation on the right of succession to a separate class of property.

"The class on which a tax is thus levied is general, uniform, and pertains to all species of property, included within that class. A tax which affects the property within a specific class is uniform as to the class, and there is no provision of the constitution which precludes legislative action from assessing a tax on that particular class. By this act of the legislature six classes of property are created, heretofore absolutely unknown. *It is those classes of property depending upon the estate owned by one dying possessed thereof which the State may regulate as to its descent and the right to devise.* The tax assessed on classes thus created is absolutely uniform on all the classes upon which it operates, and under the provisions of the statute is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property inherited, and is not inconsistent with the principle of taxation fixed by the constitution, and is clearly within the sections of the constitution quoted. No want of uniformity with one living who owns property can be urged as a reason why the statute makes an inconsistent rule. No person inherits property or can take by devise except by the statute; and the State, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown."

The words which we have italicised are urged to support appellant's contention, but it is manifest that they do not do so when considered in relation to that which precedes and follows them, and it

is, therefore, the estates which descend or are received which the court decides are new property, and which are to pay a tax in proportion to their value.

Appellant, however, says: "The progression is likewise unnecessarily arbitrary if we take the view that the tax is levied on the amount received. . . . . . Under such an assumption those taking the larger amounts are required to pay a larger rate on the same sums upon which those taking smaller sums pay a smaller rate; that is to say, one who receives a legacy of $10,000 pays 3 per cent, or $300, thus receiving $9,700 net, while one receiving a legacy of $10,001 pays 4 per cent on the whole amount, or $400.04, thus receiving $9,600.96, $99.04 less than the one whose legacy was actually one dollar less valuable. This method is applied throughout the class. Other examples might be stated."

The reasoning of appellant is based on the view that the tax is one on property instead of one on the succession, as held by the Supreme Court of the State. Being on the succession, the court further held, as we have seen, that the latter is to be regarded as new property, and the $20,000 and other property not taxed or not, therefore, exemptions.

In this view the Illinois court is in harmony with the majority of other courts of the country. We concur in the reasoning. It is true that the amount of the exemption is greater in the Illinois law than in any other, but the right to exempt cannot depend on that. Whether it shall be $20,000 as in Illinois law or $10,000 as in that of Massachusetts, or other amounts as in other laws, must depend upon the judgment of the legislature of each State, and cannot be subject to judicial review. If such review could ascertain the factors of judgment and could apply them with indisputable wisdom to the different conditions existing, it would be outside of its province to do so. That manifestly is a legislative, not a judicial, function.

The first and second cases, therefore, of the statute depend upon substantial distinctions and their classifications are not arbitrary. . . . . . .

The provisions of the statute in regard to the tax on legacies to strangers to the blood of an intestate need further comment. These provisions are as follows:

"On each and every one hundred dollars of the clear market value of all property and at the same rate for any less amount on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars, and

not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars; Provided, that an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax."

There are four classes created, and manifestly there is equality between the members of each class. Inequality is only found by comparing the members of one class with those of another. It is illustrated by appellant as follows: One who receives a legacy of $10,000, pays 3 per cent or $300, thus receiving $9,700 net; while one receiving a legacy of $10,001 pays 4 per cent on the whole amount, or $400.04, thus receiving $9,600.96, or $99.04 less than the one whose legacy was actually one dollar less valuable. This method is applied throughout the class.

These, however, are conceded to be extreme illustrations, and we think, therefore, that they furnish no test of the practical operation of the classification. When the legacies differ in substantial extent, if the rate increases the benefit increases to greater degree.

If there is unsoundness it must be in the classification. The members of each class are treated alike, that is to say, all who inherit $10,000 are treated alike,—all who inherit any other sum are treated alike. There is equality, therefore, within the classes. If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed, and hence that an inheritance of $10,000 or less pays 3 per cent, and that one over $10,000 pays not 3 per cent on $10,000 and an increased percentage on the excess over $10,000, but an increased percentage on the $10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of ten thousand and one dollars by the deduction of the tax receives $99.04 less than the one who is given a legacy of $10,000. But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment. The rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the

liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into United States courts by amounts. Regarding these alone, there is the same inequality that is urged against the classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality, nevertheless they are universally imposed and their legality has never been questioned. We think the classification of the Illinois law was in the power of the legislature to make, and the decree of the Circuit Court is

Affirmed.

Mr. Justice BREWER dissenting.

As to the propriety of progressive inheritance taxes under some of the state constitutions see note to Matter of Mayor, 11 Johnson 77, *Infra.* See also Knowlton v. Moore, 178 U. S. 41, *Infra.*

IV. DIRECT TAXES.

SPRINGER V. UNITED STATES.

Supreme Court of the United States. October, 1880.
102 United States 586.

Mr. Justice SWAYNE . . . . . delivered the opinion of the court.

The central and controlling question in this case is whether the tax which was levied on the income, gains, and profits of the plaintiff in error, as set forth in the record, and by pretended virtue of the acts of Congress and parts of acts therein mentioned, is a direct tax. It is fundamental with respect to the rights of the parties and result of the case. . . . . .

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The clauses of the constitution bearing on the subject are as follows:—

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. . . . No capitation or other direct tax shall be laid unless in proportion to the census hereinbefore directed to be taken."

Was the tax here in question a direct tax? If it was, not having been laid according to the requirements of the constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void.

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There are four adjudications by this court to be considered. They have an important, if not a conclusive, application to the case in hand. In *Hylton* v. *United States, supra* [3 Dallas, 171], a tax had been laid upon pleasure-carriages. The plaintiff in error insisted that the tax was void, because it was a direct tax, and had not been apportioned among the States as required by the Constitution, where such taxes are imposed. The case was argued on both sides by counsel of eminence and ability. It was heard and determined by four judges,—Wilson, Paterson, Chase, and Iredell. The three first named had been distinguished members of the constitutional convention. Wilson was on the committee that reported the completed draft of the instrument, and warmly advocated its adoption in the State convention of Pennsylvania. The fourth was a member of the convention of North Carolina that adopted the Constitution. The case was decided in 1795. The judges were unanimous. The tax was held not to be a *direct tax.* Each judge delivered a separate opinion. Their judgment was put on the ground indicated by Mr. Justice Chase, in the following extract from his opinion:

"It appears to me that a tax on carriages cannot be laid by the rule of *apportionment* without very great inequality and injustice. For example, suppose two States equal in census to pay eighty thousand dollars each by a tax on carriages of eight dollars on every carriage; and in one State there are one hundred carriages and in the other one thousand. The owners of carriages in one State would pay ten times the tax of owners in the other. A, in one State, would pay for his carriage eight dollars; but B, in the other State, would pay for his carriage eighty dollars."

It was well held that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made. This view applies with even greater force to the tax in question in this case. Where the population is large and the incomes are few and small, it would be intolerably oppressive.

The difference in the ability of communities, without reference to numbers, to pay any taxes is forcibly remarked upon by McCulloh

in his article on taxation in the Encyclopædia Britannica, vol. xxi, (old ed.), p. 75.

Mr. Justice Chase said further, "That he would give no judicial opinion upon the subject, but that he was inclined to think that *direct taxes* contemplated by the Constitution were only two,—a capitation tax and a tax on land."

Mr. Justice Iredell said: "Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil. . . . . . A land or poll tax may be considered of this description. The latter is to be so considered, particularly under the present Constitution, on account of the slaves in the Southern States, who give a ratio in the representation in the population of three to five."

Mr. Justice Paterson said, he never entertained a doubt "that the principal, he would not say the *only*, objects contemplated by the Constitution as falling within the rule of apportionment, were a capitation tax and a tax on land." From these views the other judges expressed no dissent.

"Ellsworth, the Chief Justice, sworn into office that morning, not having heard the whole argument, declined taking any part in the decision." 8 Wall. 545. Cushing, from ill-health did not sit in the case. It has been remarked that if they had been dissatisfied with the result, the question involved being so important, doubtless a re-argument would have been had.

In *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433, the taxes in question were upon the receipts of such companies from premiums and assessments, and upon all sums made or added, during the year, to their surplus or contingent funds. This court held unanimously that the taxes were not *direct taxes,* and that they were valid.

In *Veazie Bank* v. *Fenno, supra* [8 Wall. 533], the tax which came under consideration was one of ten per cent upon the notes of State banks paid out by other banks, State or national. The same conclusions were reached by the court as in the preceding case. Mr. Chief Justice Chase delivered the opinion of the court. In the course of his elaborate examination of the subject he said, "It may be rightly affirmed that, in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances and taxes on polls, or capitation taxes."

In *Scholey* v. *Rew* (23 Wall. 331), the tax involved was a succession tax, imposed by the acts of Congress of June 30, 1864, and July 13, 1866. It was held that the tax was not a *direct* tax, and that it was constitutional and valid. In delivering the opinion of

the court, Mr. Justice Clifford, after remarking that the tax there in question was not a direct tax, said: "Instead of that, it is plainly an excise tax or duty, authorized by sect. 1, art. 8, of the Constitution, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and public welfare."

He said further: "Taxes on houses, lands, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the Constitution, are within the same category; but it has never been decided that any other legal exactions for the support of the Federal government fall within the condition that unless laid in proportion to numbers the assessment is invalid."

All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error.

The question, what is a direct tax, is one exclusively in American jurisprudence. The text-writers of the country are in entire accord upon the subject.

Mr. Justice Story says all taxes are usually divided into two classes,—those which are *direct* and those which are *indirect*,—and that "under the former denomination are included taxes on land and real property, and, under the latter, taxes on consumption." 1 Const., sect. 950.

Chancellor Kent, speaking of the case of *Hylton* v. *United States*, says: "The better opinion seems to be that the direct taxes contemplated by the Constitution were only two; viz, a capitation or poll tax and a tax on land." 1 Com. 257. See also Cooley, Taxation, p. 5, note 2; Pomeroy, Const. Law, 157; Sharwood's Blackstone, 308, note; Rawle, Const. 30; Sergeant, Const. 305.

We are not aware that any writer, since *Hylton* v. *United States* was decided, has expressed a view of the subject different from that of these authors.

Our conclusions are, that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. Pomeroy, Const. Law, 177; *Pacific Insurance Co.* v. *Soule*, and *Scholey* v. *Rew*, *supra*.

Against the considerations, in one scale, in favor of these propositions, what has been placed in the other, as a counterpoise? Our answer is, certainly nothing of such weight, in our judgment, as to require any special reply.

The numerous citations from the writings of foreign political economists, made by the plaintiff in error, are sufficiently answered by Hamilton in his brief, before referred to.

Judgment affirmed.

POLLOCK V. FARMERS' LOAN AND TRUST CO.

Supreme Court of the United States. May, 1895.
158 United States, 601.

These cases were decided on the 8th of April, 1895, 157 U. S. 429. Thereupon the appellants filed a petition for a rehearing.

Mr. Chief Justice FULLER delivered the opinion of the court.

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. . . . . The Constitution divided Federal taxation into two great classes, the class of direct taxes, and the class of duties, imposts, and excises; and prescribed two rules which qualified the grant of power as to each class.

. . . .

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution.

. . . .

We know of no reason for holding otherwise than that the words

"direct taxes," on the one hand, and "duties, imposts and excises," on the other, were used in the Constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified.

. . . .

The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. The States, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted power to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from commerce; they retained the concurrent power of levying excises, and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition and resources as States; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government. If in the changes of wealth and population in particular States, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the States, however small, in the Senate, was stipulated for. The Constitution ordains affirmatively that each State shall have two members of that body, and negatively that no State shall by amendment be deprived of its equal suffrage in the Senate without its consent. The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation

on accumulated property, while they expected that those of the Federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised, except on necessity; and, when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminately, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Marshall, in *McCulloch* v. *Maryland,* "the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." 4 Wheat. 428. And they retained this security by providing that direct taxation and representation in the lower house of Congress should be adjusted on the same measure.

Moreover, whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language

It is said that a tax on the whole income of property is not a direct tax in the meaning of the Constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breath, and the restriction blown to the winds in another.

Cooley (On Taxation, p. 3) says that the word *"duty"* ordinarily "means an indirect tax imposed on the importation, exportation, or consumption of goods;" having "a broader meaning than *custom,* which is a duty imposed on imports or exports," that "the term *impost* also signifies any tax, tribute or duty, but it is seldom applied to any but the indirect taxes. An *excise* duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities."

In the Constitution, the words "duties, imposts and excises" are put in antithesis to direct taxes. Gouverneur Morris recognized this in his remarks in modifying his celebrated motion, as did Wilson in approving of the motion as modified. 5 Ell. Deb. (Madison Papers), 302. And Mr. Justice Story, in his Commentaries on the Constitution, (§ 952), expresses the view that it is not unreasonable to presume that the word "duties" was used as equivalent to "customs" or "imposts" by framers of the Constitution, since in other clauses

it was provided that "No tax or duty shall be laid on articles exported from any State," and that "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and he refers to a letter of Mr. Madison to Mr. Cabell, of September 18, 1828, to that effect. 3 Madison's Writings 636.

In this connection it may be useful, though at the risk of repetition, to refer to the views of Hamilton and Madison as thrown into relief in the pages of the Federalist, and in respect of the enactment of the carriage tax act, and again to briefly consider the *Hylton Case,* 3 Dall. 171, so much dwelt on in argument.

The act of June 5, 1794, c. 45, 1 Stat. 373, laying duties upon carriages for the conveyance of persons, was enacted in a time of threatened war. Bills were then pending in Congress to increase the military force of the United States, and to authorize increased taxation in various directions. It was, therefore, as much a part of a system of taxation in war times, as was the income tax of the war of the rebellion. The bill passed the House on the twenty-ninth of May, apparently after a very short debate. Mr. Madison and Mr. Ames are the only speakers on that day reported in the Annals. "Mr. Madison objected to this tax on carriages as an unconstitutional tax; and, as an unconstitutional measure, he would vote against it." Mr. Ames said: "It was not to be wondered at if he, coming from so different a part of the country, should have a different idea of this tax from the gentleman who spoke last. In Massachusetts, this tax had long been known; and there it was called an excise. It was difficult to define whether a tax is direct or not. He had satisfied himself that this was not so." Annals, 3d Cong. 730.

On the first of June, 1794, Mr. Madison wrote to Mr. Jefferson: "The carriage tax, which only struck at the Constitution, has passed the House of Representatives." 3 Madison's Writings 18. The bill then went to the Senate, where, on the third day of June, it "was considered and adopted." Annals, 3d Cong. 119, and on the following day it received the signature of President Washington. On the same third day of June the Senate considered "an act laying certain duties upon snuff and refined sugar;" "an act making further provisions for securing and collecting the duties on foreign and domestic distilled spirits, stills, wines, and teas;" "an act for the more effectual protection of the Southwestern frontier;" "an act laying additional duties on licenses for selling wines and foreign distilled spirituous liquors by retail:" and "an act laying duties on property sold at auction."

It appears then that Mr. Madison regarded the carriage tax as unconstitutional, and accordingly gave his vote against it, although it was to a large extent, if not altogether, a war measure.

Where did Mr. Hamilton stand? At that time he was Secretary of the Treasury, and it may therefore be assumed, without proof, that he favored the legislation. But upon what ground? He must, of course, have come to the conclusion that it was not a direct tax. Did he agree with Fisher Ames, his personal and political friend, that the tax was an excise? The evidence is overwhelming that he did.

In the thirtieth number of the Federalist, after depicting the helpless and hopeless condition of the country growing out of the inability of the confederation to obtain from the States the moneys assigned to its expenses, he says: "The more intelligent adversaries of the new Constitution admit the force of this reasoning; but they qualify their admission, by a distinction between what they call *internal* and *external* taxations. The former they would reserve to the state governments; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the Federal head." In the thirty-sixth number, while still adopting the division of his opponents, he says: "The taxes intended to be comprised under the general denomination of internal taxes, may be subdivided into those of the *direct* and those of the *indirect* kind. . . . . As to the latter, *by which must be understood duties and excises on articles of consumption,* one is at a loss to conceive, what can be the nature of the difficulties apprehended." Thus we find Mr. Hamilton, while writing to induce the adoption of the Constitution, *first,* dividing the powers of taxation into *external* and *internal,* putting into the former the power of imposing duties on imported articles and into the latter all remaining powers; and, *second,* dividing the latter into *direct* and *indirect,* putting into the latter, duties and excises on articles of consumption.

It seems to us to inevitably follow that in Mr. Hamilton's judgment at that time all internal taxes except duties and excises on articles of consumption, fell into the category of direct taxes.

Did he in supporting the carriage tax bill, change his views in this respect? His argument in the *Hylton case* in support of the law enables us to answer this question. It was not reported by Dallas, but was published in 1851 by his son in the edition of all Hamilton's writings except the Federalist. After saying that we shall seek in vain for any legal meaning of the respective terms "direct

and indirect taxes," and after forcibly stating the impossibility of collecting the tax if it is to be considered a direct tax, he says, doubtingly: "The following are presumed to be the only direct taxes. Capitation or poll taxes. Taxes on lands and buildings. General assessments, whether on the whole property of individuals, or on their whole real or personal estate; all else must of necessity be considered as indirect taxes." *"Duties, imposts and excises* appear to be contradistinguished from taxes." "If the meaning of the word *excise* is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an *excise."* "Where so important a distinction in the Constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived." 7 Hamilton's Works, 848. Mr. Hamilton, therefore, clearly supported the law which Mr. Madison opposed, for the same reason that his friend Fisher Ames did, because it was an excise, and as such was specifically comprehended by the Constitution. Any loose expressions in definition of the word "direct," so far as conflicting with his well considered views in the Federalist, must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject. He gives, however, it appears to us, a definition which covers the question before us. A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution. And Mr. Hamilton, in his report on the public credit, in referring to contracts with citizens of a foreign country, said: "This principle, which seems critically correct, would exempt as well the income as the capital of the property. It protects the use, as effectually as the thing. What, in fact, is property, but a fiction, without the beneficial use of it? In many cases, indeed, the *income* or *annuity* is the property itself." 3 Hamilton's Works, 34.

We think there is nothing in the *Hylton case* in conflict with the foregoing.

. . . .

What was decided in the *Hylton case* was, ... that a tax on carriages was an excise, and, therefore, an indirect tax. The contention of Mr. Madison in the House was only so far disturbed by it, that the court classified it where he himself would have held it constitutional, and he subsequently as President approved of a similar act. 3 Stat. 40. The contention of Mr. Hamilton in the Federalist was not disturbed by it in the least. In our judgment,

the construction given to the Constitution by the authors of the Federalist (the five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty making power) should not and cannot be disregarded.

The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the Constitution. because confined to the income therefrom?

Whatever the speculative views of political economists or revenue reformers may be, can it properly be held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the product of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes are levied under the authority of the State are laid and assessed."

Personal property of some kind is of general distribution; and

so are incomes, though the taxable range thereof might be narrowed through large exemptions.

. . . .

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from whence it is derived.

. . . .

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney-General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution.

. . . .

At the time the Constitution was framed and adopted, under the systems of direct taxation of many of the States, taxes were laid on incomes from professions, business, or employments, as well as from "offices and places of profit"; but if it were the fact that there had been no income tax law, such as this, it would not be of controlling importance. A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed.

. . . .

Being direct, and therefore to be laid by apportionment, is

there any real difficulty in doing so? Cannot Congress, if the necessity exists of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each State upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all real and personal property and the income of all persons in the State, and to collect the same if the State does not in the meantime assume and pay its quota and collect the amount according to its own system and its own way? Cannot Congress do this, as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient, as indeed was done in the act of July 14, 1798, c. 75, 1 Stat. 597? Inconveniences might possibly attend the levy of an income tax, notwithstanding the listing of receipts, when adjusted, furnishes its own valuation; but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable.

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Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced that, taxes on real estate being indisputably direct taxes, taxes on the rent or income of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property or on income of personal property, are likewise direct taxes.

Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

V. Uniformity Throughout the United States.

KNOWLTON V. MOORE.

Supreme Court of the United States. May, 1900.
178 United States 41.

Mr. Justice White delivered the opinion of the court.

. . . .

Demand having been made by the collector for the payment,

accompanied with a threat to distrain in case of refusal, the tax was paid under written protest. . . . . . In the receipt given it was recited that the tax had been paid under protest to avoid the use of compulsory process. A petition for refunding was subsequently presented, by the executors, in which the grounds of protest were reiterated. The Commissioner of Internal Revenue having made an adverse ruling, the present suit was commenced to recover the amount paid. The facts as to the assessment and collection of the taxes were averred, and the refusal of the internal revenue commissioner to refund was alleged. The petition for refunding was made a part of the pleadings. The right to repayment was based upon the averment that the sections of the statute, under authority of which the amount had been assessed and collected, were unconstitutional. The Circuit Court sustained a demurrer, on the ground that no cause of action was alleged. The claim was rejected, and the suit was dismissed with costs.

The questions which arise on this writ of error, to review the judgment of the Circuit Court, are fourfold: First, that the taxes should have been refunded because they were direct taxes, and not being apportioned were hence repugnant to article 1, section 8, of the Constitution of the United States; second, if the taxes were not direct, they were levied on rights created solely by State law, depending for their continued existence on the consent of the several States, a volition which Congress has no power to control, and as to which it could not, therefore, exercise its taxing authority; third, if the taxes were not direct, and were not assessed upon objects or rights which were beyond the reach of Congress, nevertheless the taxes were void, because they were not uniform throughout the United States, as required by article 1, section 9, of the Constitution of the United States; fourth, because, although the taxes be held to have been in all respects constitutional, nevertheless they were illegal, since in their assessment the rate of the tax was determined by the aggregate amount of the personal estate of the deceased, and not by the sum of the legacies or distributive shares, or the right to take the same, which were the objects upon which, by the law, the taxes were placed.

Although it may be, in the abstract, an analysis of these questions, in logical sequence, would require a consideration of the propositions in the order just stated, we shall not do so for the following reasons: The inquiry whether the taxes are direct or indirect must involve the prior determination of the objects or rights upon which by law they are imposed and assessed, since

it becomes essential primarily to know what the law assesses and taxes in order to completely learn the nature of the burden. So, also, to solve the contention as to want of uniformity, it is requisite to understand not only the objects or rights which are taxed, but the method ordained by the statute for assessing and collecting. This must be the case, since uniformity, in whatever aspect it be considered, involves knowledge as to the operation of the taxing law, an understanding of which cannot be arrived at without a clear conception of what the law commands to be done. For these reasons we shall first, in a general way, consider upon what rights or objects death duties, as they are termed in England, are imposed. Having, from a review of the history of such taxes, reached a conclusion on this subject, we shall decide whether Congress has power to levy such taxes. This being settled, we shall analyze the particular act under review, for the purpose of ascertaining the precise form of tax for which it provides and the mode of assessment which it directs. These questions being disoposed of, we shall determine whether the taxes which the act imposes are void, because not apportioned or for the want of uniformity.

It is conceded on all sides that the levy and collection of some form of death duty is provided by the sections of the law in question. Bearing this in mind, the exact form of the tax and the method of its assessment need not be presently defined, since doing so appropriately belongs to the more specific interpretation of the statute to which we shall hereafter direct our attention. Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy. . . . . .

. . . .

Having ascertained the nature of death duties, the first question which arises is this: Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which

falls alone within the reach of state legislation. It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government. . . . . . It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and, although their constitutionality was assailed on other grounds held unsound by this Court, the question of want of authority of Congress to levy a tax on inheritances and legacies was never urged against the acts in question. Whilst these considerations are of great weight, let us for the moment put them aside to consider the reasoning upon which the proposition denying the power of Congress to impose death duties must rest.

Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of these words be accurately understood. They have been used where the power of a state government to levy a particular form of inheritance or legacy tax has in some instances been assailed because of a constitutional limitation on the taxing power. Under these circumstances, the question has arisen whether, because of the power of the State to regulate the transmission of property by death, there did not therefore exist a less trammeled right to tax inheritances and legacies than obtained as to other subject-matters of taxation, and, upon the affirmative view being adopted, a tax upon inheritances or legacies for this reason has been spoken of as privilege taxation, or a tax on privileges. The conception, then, as to the privilege, whilst conceding fully that the occasion of the transmission or receipt of property by death is a usual subject of the taxing power, yet maintains that a wider discretion or privilege is vested in the States, because of the right to regulate. Courts which maintain this view have therefore treated death duties as disenthralled from limitations which would otherwise apply, if the privilege of regulation did not exist.

. . . .

All courts and all governments, however, ... conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is, nevertheless, a usual subject of taxation. Of course, in considering the power of Con-

gress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States and not in Congress.

It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual subjects of taxation. Indeed, as said in the *License Tax Cases*, 5 Wall. 462, 471, after referring to the limitations expressed in the Constitution, "Thus limited, and thus only, it (the taxing power of Congress) reaches every subject, and may be exercised at discretion." The limitation which would exclude from Congress the right to tax inheritances and legacies is made to depend upon the contention that as the power to regulate successions is lodged solely in the several States, therefore Congress is without authority to tax the transmission or receipt of property by death. . . . . .

But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress. Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition

here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate. . . . . . .

We are then brought to a consideration of the particular form of death duty, which is manifested by the statute under consideration. . . . . .

It is at the outset obvious that the exact meaning of the statute is not free from perplexity, as there are clauses in it, when looked at apart from their context, which may give rise to conflicting views. It is plain, however, that the statute must mean one of three things:

1. The tax which it imposes is on the passing of the whole amount of the personal estate, with a progressive rate depending upon the sum of the whole personal estate; or,

2. The tax which it levies is placed on the passing of legacies or distributive shares of personal property at a progressive rate, the amount of such rate being determined, not by the separate sum of each legacy or distributive share, but by the volume of the whole personal estate. This is the mode in which the tax was computed by the assessor, and which was sustained by the court below; or,

3. The tax is on the passing of legacies or distributive shares of personalty, with a progressive rate on each, separately determined by the sum of each of such legacies or distributive shares.

. . . .

The tax being then on the legacies and distributive shares, the rate primarily being determined by the relation of the legatees or distributees to the estate, does the law command that the progressive rate of tax which it imposes on the legacies or distributive shares shall be measured, not separately by the amount of each particular legacy or distributive share, but by the sum of the whole personal estate? This, as we have said, is the interpretation of the act which was adopted by the assessor in levying the taxes under review, and which was sustained by the court below.

. . . .

Granting, however, that there is doubt as to the construction, in view of the consequences which result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundred-fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying and leaving an estate of $10,500, bequeaths to a hospital ten thousand dollars. The rate of tax would be five per cent, and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given.

We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. *Bate Refrigerating Co.* v. *Sulzeberger,* 157 U. S. 1, 37; *Wilson* v. *Rousseau,* 4 How. 646, 680; *Bloomer* v. *McQuewan,* 14 How. 539, 553; *Blake* v. *National Banks,* 23 Wall. 307, 320; *United States* v. *Kirby,* 7 Wall. 482, 486. . . . . .

It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one

person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, since, as we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it by the court below.

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The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. That death duties, generally, have been from the beginning in all countries considered as different from taxes levied on property, real or personal, directly on account of the ownership and possession thereof, is demonstrated by the review which we have previously made. It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed. This legislative and administrative view of such taxes has been directly upheld by this court. In *Scholey* v. *Rew*, 23 Wall. 331, 349, ... the question presented was the constitutionality of the provisions of the act of 1864, imposing a succession duty as to real estate. The assertion was that the duty was repugnant to the Constitution, because it was a direct tax and had not been apportioned. The tax was decided to be constitutional. The court said (p. 346):

"But it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of these provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare."

. . . .

Concluding, then, that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity.

The contention is that the statute exempts legacies and distributive shares in personal property below ten thousand dollars, because

it classifies the rate of tax according to the relationship or absence of relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of section 8 article 1 of the Constitution, which provides "the duties, imposts and excises shall be uniform throughout the United States."

The argument to the contrary, whilst conceding that the tax devised by the statute does not fulfill the requirement of equality and uniformity, as those words are construed when found in state constitutions, asserts that it does not thereby follow that the taxes in question are repugnant to the Constitution of the United States, since the provisions in the Constitution, that "duties, imposts and excises shall be uniform throughout the United States," it is insisted has a different meaning from the expression equal and uniform, found in state constitutions. In order to decide these respective contentions it becomes at the outset necessary to accurately define the theories upon which they rest.

On the one side, the proposition is that the command that duties, imposts and excises shall be uniform throughout the United States relates to the inherent and intrinsic character of the tax; that it contemplates the operation of the tax upon the property of the individual taxpayer, and exacts that when an impost, duty or excise is levied, it shall operate precisely in the same manner upon all individuals; that is to say, the proposition is that "uniform throughout the United States" commands that excises, duties and imposts, when levied, shall be equal and uniform in their operation upon persons and property in the sense of the meaning of the words equal and uniform, as now found in the constitution of most of the States of the Union. The contrary construction is this: That the words "uniform throughout the United States" do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States—that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate. The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost or excise which is not intrinsically equal and uniform in its operation upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution re-

strained only by the requirement that such taxes be geographically uniform.

. . . .

Considering the text, it is apparent that if the word "uniform" means "equal and uniform" in the sense now asserted by the opponents of the tax, the words "throughout the United States" are deprived of all real significance, and sustaining the contention must hence lead to a disregard of the elementary canon of construction which requires that effect be given to each word of the Constitution.

Taking a wider view, it is to be remembered that the power to tax contained in section 8 of article 1 is to lay and collect "taxes, duties, imposts and excises. . . . . . But all duties, imposts and excises shall be uniform throughout the United States." Thus, the qualification of uniformity is imposed, not upon all taxes which the Constitution authorizes, but only on duties, imposts and excises. The conclusion that inherent equality and uniformity is contemplated involves, therefore, the proposition that the rule of intrinsic uniformity is applied by the Constitution to taxation by means of duties, imposts and excises, and it is not applicable to any other form of taxes. It cannot be doubted that in levying direct taxes, after apportioning the amount among the several States, as provided in clause 4 of section 9 of article 1 of the Constitution, Congress has the power to choose the objects of direct taxation, and to levy the quota as apportioned directly upon the objects so selected. Even then, if the view of inherent uniformity be the true one, none of the taxes so levied would be subjected to such rule, as the requirement only relates to duties, imposts and excises.

But the classes of taxes termed duties, imposts and excises, to which the rule of uniformity applies, are those to which the principle of equality and uniformity in the sense claimed, is in the nature of things the least applicable and least susceptible of being enforced. Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. The claim of intrinsic uniformity, therefore, imputes to the framers a restriction as to certain forms of taxes, where the restraint was least appropriate and the omission where it was most needed. This discord which

the construction, if well founded, would create, suggests at once the unsoundness of the proposition, and gives rise to the inference that the contrary view by which the unity of the provisions of the Constitution is maintained, must be the correct one. In fact, it is apparent that if imposts, duties and excises are controlled by the rule of intrinsic uniformity, the methods usually employed at the time of the adoption of the Constitution in all countries in the levy of such taxes would have to be abandoned in this country, and, therefore, whilst nominally having the authority to impose taxes of this character, the power to do so would virtually be denied to Congress.

Now, that the requirement that direct taxes should be apportioned among the several States, contemplated the protection of the States, to prevent their being called upon to contribute more than was deemed their due share of the burden, is clear. Giving to the term uniformity as applied to duties, imposts and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the States, by the levying of duties, imposts or excises upon a particular subject in one State and a different duty, impost or excise on the same subject in another; and, therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes. And the conclusion that the possible discrimination against one or more States was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts and excises, is greatly strengthened by considering the state of the law in the mother country and in the colonies, and the practice of taxation which obtained at or about the time of the adoption of the Constitution.

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In taxing laws of the original States prior to the Convention of 1787, exemptions were allowed from a consideration of what was deemed best for the general welfare, and taxes were frequently laid from a consideration of the presumed ability of the owner to pay the tax. Discriminations and exemptions were also contained in various State taxing laws, which illustrate the discretion vested in the legislative bodies of the States in the latter part of the eighteenth century. . . . . . .

It cannot be, therefore, supposed that the framers of the Constitution, in using the words "uniform throughout the United States," contemplated to confer the power to levy duties, imposts and excises, and yet to accompany this grant of authority with a restriction which had never found expression as to such taxes at that time

anywhere, and which was contrary to the practice which had uniformly obtained both in the mother country and in the colonies, and in the States prior to the adoption of the Constitution. But, one of the most satisfactory answers to the argument that the uniformity required by the Constitution is the same as the equal and uniform clause which has since been embodied in so many of the state constitutions, results from a review of the practice under the Constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts and excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced. Take, for a general example, specific import duties, by which particular specific rates are imposed on enumerated articles, without reference to their value. It is manifest that all such duties are void, if intrinsic equality and uniformity be the rule, and yet in all the great controversies which have arisen over the policy of impost duties generally, and particularly as to the economic wisdom of specific duties, never has it been contended that the power to impose them did not exist because of the uniformity clause of the Constitution. So, also, mention may be made of the common form of the excises on distilled spirits with the tax per gallon without reference to the value thereof.

Indeed, tariff duties have not only varied with different articles, but have varied with the different valuations of the same article. . .

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Nor can it be said that these illustrations relate to legislation enacted long after the adoption of the Constitution, when by lapse of time an erroneous conception as to the meaning of the Constitution had arisen, for the examples to which we have just referred are but types of many forms of taxation by way of duties, imposts and excises which were enacted without question from the very beginning, and have continued in an unbroken line to the present time, sanctioned by the founders of our institutions and approved in practical execution by all the illustrious men who have directed the public destinies of the nation. Excise taxes were largely used during the administration of President Washington, and again during and after the war of 1812. It may properly be said of these excises that none of them were uniform according to the principles now contended for, yet no constitutional question in this regard was ever raised about them. . . . . .

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Thus, it came to pass that although the provisions as to preference

between ports and that regarding uniformity of duties, imposts and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style. The first now stands in the Constitution as a part of the sixth clause of section 7 of article 1, and the other is a part of the first clause of section 8 of article 1. By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. And it also results that the assertion to which we at the outset referred, that the decision in the *Head Money cases,* holding that the word uniform must be interpreted in a geographical sense, was not authoritative, because the case in reality solely involved the clause of the Constitution forbidding preferences between ports, is shown to be unsound, since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception.

. . . .

Having disposed of the question of uniformity, we are next brought to consider certain contentions which relate to that subject. It is argued that even although it be conceded that the uniformity required by the Constitution is only geographical, the particular law in question does not fulfill the requirements of even geographical uniformity, since it does not apply to the District of Columbia. We think this contention is without merit.

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It is yet further asserted that the tax does not fulfill the requirements of geographical uniformity, for the following reasons: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every State. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the States may obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts and excises must be found in uniform quantities and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution

commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States. Indeed, the contention was substantially disposed of in the *License Tax Cases,* 5 Wall. 472.

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Lastly, it is urged that the progressive rate feature of the statute is so repugnant to fundamental principles of equality and justice that the law should be held to be void, even although it transgresses no express limitation in the Constitution. Without intimating any opinion as to the existence of a right in the courts to exercise the power which is thus invoked, it is apparent that the argument as to the enormity of the tax is without merit. It was disposed of in *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293.

The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory, is obvious.

It follows from the foregoing opinion that the court below erred in denying all relief, and that it should have held the plaintiff entitled to recover so much of the tax as resulted from taxing legacies not exceeding ten thousand dollars, and from increasing the tax rate with reference to the whole amount of the personal estate of the deceased from which the legacies or distributive shares were derived. For these reasons

The judgment below must be reversed and the case be remanded

with instructions that further proceedings be had according to law and in conformity with this opinion, and it is so ordered.

Mr. Justice BREWER dissented from so much of the opinion as holds that a progressive rate of tax can be validly imposed. In other respects he concurred.

Mr. Justice PECKHAM took no part in the decision.

Mr. Justice HARLAN, with whom concurred Mr. Justice McKenna, dissenting.

While I concur in the construction placed by the court upon the clause of the Constitution declaring that all duties, imposts and excises shall be "uniform throughout the United States," I dissent from that part of the opinion construing the twenty-ninth and thirtieth sections of the Revenue Act. In my judgment, the question whether the tax presented by Congress shall or shall not be imposed is to be determined with reference to the whole amount of the personal property out of which legacies and distributive shares arise. If the value of the whole personal property held in charge or trust by an administrator, executor or trustee exceeds ten thousand dollars, then every part of it constituting a legacy or distributive share, except the share of a husband or wife, is taxed at the progressive rate stated in the act of Congress. I do not think the act can be otherwise interpreted without defeating the intent of Congress.

Construed as I have indicated, the act is not liable to any constitutional objection.

DOOLEY V. UNITED STATES.

Supreme Court of the United States. October, 1901.
183 United States 151.

This was an action begun in the Circuit Court as a Court of Claims by the firm of Dooley, Smith & Co., to recover duties exacted of them and paid under protest to the collector of the port of San Juan, Porto Rico, upon merchandise imported into that port from the port of New York after May 1, 1900, and since the Foraker act. The act requires all merchandise "coming into Porto Rico from the United States" to be "entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be

levied, collected and paid upon like articles of merchandise imported from foreign countries."

A demurrer was interposed by the District Attorney upon the ground that the court had no jurisdiction of the subject of the action, and also that the complaint did not state facts sufficient to constitute a cause of action. The demurrer to the complaint for insufficiency was sustained, and the petition dismissed.

Mr. Justice BROWN, after stating the case, delivered the opinion of the court.

This case raises the question of the constitutionality of the Foraker act, so far as it fixes the duties to be paid upon merchandise imported into Porto Rico from the port of New York.

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. . . . . By section four, "the duties and taxes collected in Porto Rico in pursuance of this act, less the cost of collecting the same, and the gross amount of all collections and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Porto Rico, until the government of Porto Rico, herein provided for, shall have been organized, when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Porto Rico."

Now, there can be no doubt whatever that, if the legislative assembly of Porto Rico should, with the consent of Congress, lay a tax upon goods arriving from ports of the United States, such tax, if legally imposed, would be a duty upon imports to Porto Rico, and not upon exports from the United States; and we think the same result must follow, if the duty be laid by Congress in the interest and for the benefit of Porto Rico. The truth is, that, in imposing the duty as a temporary expedient, with a proviso that it may be abolished by the legislative assembly of Porto Rico, at its will, Congress thereby shows that it is undertaking to legislate for the island for the time being and only until the local government is put into operation. The mere fact that the duty passes through the hands of the revenue officers of the United States is immaterial, in view of the requirement that it shall not be covered into the general fund of the Treasury, but be held as a separate fund for the government and benefit of Porto Rico.

. . . .

These duties were properly collected, and the action of the circuit

court in sustaining the demurrer to the complaint was correct, and it is therefore

Affirmed.

In Downes v. Bidwell, 182 U. S. 245, it was held that the uniformity clause in the United States constitution did not affect that part of the territory of the United States which had not been formally incorporated into the United States and thus made subject to the provisions of the constitution by act of Congress.

CHAPTER IV.

THE PURPOSES FOR WHICH TAXES MAY BE LAID.

LOAN ASSOCIATION V. TOPEKA.

Supreme Court of the United States. October, 1874.
20 Wallace, 655.

The Citizens' Saving and Loan Association of Cleveland brought their action in the court below, against the city of Topeka, on coupons for interest attached to bonds of the city of Topeka.

The bonds on their face purported to be payable to the King Wrought-Iron Bridge Manufacturing and Iron-Works Company, of Topeka, to aid and encourage that company in establishing and operating bridge shops in said city of Topeka, under and in pursuance of section twenty-six of an act of the legislature of the State of Kansas, entitled "An act to incorporate cities of the second class," approved February 29th, 1872; and also of another "Act to authorize cities and counties to issue bonds for the purpose of building bridges, aiding railroads, water-power, or other works of internal improvement," approved March 2d, 1872.

The city issued one hundred of these bonds for $1,000 each, as a *donation* (and so it was stated in the declaration), to encourage that company in its design of establishing a manufactory of iron bridges in that city.

The declaration also alleged that the interest coupons first due were paid out of a fund raised by taxation for that purpose, and that after this payment the plaintiff became the purchaser of the bonds and coupons on which suit was brought, for value.

A demurrer was interposed by the city of Topeka to this declaration.

. . . .

The single question, ... for consideration raised by the demurrer was the authority of the legislature of the State of Kansas to enact this . . . . . statute.

The court below denied the authority, placing the denial on two grounds:

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2nd. That the act authorized the towns and other municipalities

to which it applied, by issuing bonds or lending their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in the aid of the enterprise of others which were not of a public character; that this was a perversion of the right of taxation, which could only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The court below, accordingly, sustaining the demurrer, gave judgment in favor of the defendant, the city of Topeka; and to its judgment this writ of error was taken.

Mr. Justice MILLER delivered the opinion of the court.

Two grounds are taken in the opinion of the circuit judge and in the argument of the counsel for defendant, on which it is insisted that the section of the statute of February 29th, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

. . . . . We find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in the aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi-legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited

to payment from some other source, imply an obligation to pay by taxation.

It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can be lawfully levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy a tax for the purpose. (*Sharpless* v. *Mayor of Philadelphia,* 21 Pa. St. 147, 167; *Hanson* v. *Vernon,* 27 Iowa, 28; *Allen* v. *Inhabitants of Jay,* 60 Me. 127; *Lowell* v. *Boston,* 111 Mass. 454; *Whiting* v. *Fond du Lac,* 25 Wis. 188.)

It is therefore to be inferred, that when the legislature of the State authorizes a city or county to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.

With these remarks and with the reference to the authorities which support them, we assume that unless the legislature of Kansas had the right to authorize the counties and towns in that State to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the legislature of the State of Kansas.

We have already said the question is not new. The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every State in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a preponderance of authority is to be found in favor of the proposition that the legislatures of the States, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the

existence of the power altogether. (*The State* v. *Wapello County,* 9 Iowa, 308; *Hanson* v. *Vernon,* 27 Id. 28; *Sharpless* v. *Mayor,* 21 Pa. St. 147; *Whiting* v. *Fond du Lac,* 25 Wis. 188.)

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning-point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of State governments to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain—the roads which they built being under their control, and not that of the State—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way. On the other hand it was said that roads, canals, bridges, navigable streams and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the State, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation.

We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt.

We have referred to this history of the contest over aid to railroads by taxation to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the

legislative power, and was an unauthorized invasion of private right. (*Olcott* v. *Supervisors,* 16 Wallace, 689; *People* v. *Salem,* 20 Michigan, 452; *Jenkins* v. *Andover,* 103 Mass. 94; Dillon on Municipal Corporations, § 587; Redfield's Laws of Railways, 398, rule 2.)

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B. (*Whiting* v. *Fond du Lac,* 25 Wis. 188; Cooley on Constitutional Limitations, 129, 175, 487; Dillon on Municipal Corporations, § 587.)

Of all the powers conferred upon government that of taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of the government, the prosecution of war, the National defence, any limitation is unsafe. The entire resources of the people should, in some instances, be at the disposal of the government.

The power to tax, therefore, is the strongest, the most pervading of all the powers of government, reaching directly or indirectly to

all classes of the people. It was said by Chief Justice Marshall in the case of *McCullough* v. *The State of Maryland,* (4 Wheaton 431), that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley on Const. Lim. 479.

Coulter, J., in *Northern Liberties* v. *St. John's Church,* 13 Pa. St. 104 (see, also, *Pray* v. *Northern Liberties,* 31 Id. 69; *Matter of Mayor of New York,* 11 Johnson, 77; *Camden* v. *Allen,* 2 Dutcher 398; *Sharpless* v. *Mayor of Philadelphia, supra; Hanson* v. *Vernon,* 27 Iowa, 47; *Whiting* v. *Fond du Lac,* 25 Wis. 188) says, very forcibly, "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a *public purpose.* It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of public use and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes

are assessed falls upon the one side or the other of this line they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally the promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

A reference to one or two cases adjudicated by courts of the highest character will be sufficient, if any authority were needed, to sustain us in this proposition.

In the case of *Allen* v. *The Inhabitants of Jay,* (60 Me. 124), the town meeting had voted to loan their credit to the amount of $10,000 to Hutchins and Lane, if they would invest $12,000 in a steam saw-mill, grist-mill, and box-factory machinery, to be built in that town by them. There was a provision to secure the town by mortgage on the mill, and the selectmen were authorized to issue town bonds for the amount of the aid so voted. Ten of the taxable inhabitants of the town filed a bill to enjoin the selectmen from issuing the bonds.

The Supreme Judicial Court of Maine, in an able opinion by Chief Justice Appleton, held that this was not a public purpose, and that the town could levy no taxes on the inhabitants in aid of the enterprise, and could, therefore, issue no bonds, though a special act of the legislature had ratified the vote of the town, and they granted the injunction as prayed for.

Shortly after the disastrous fire in Boston, in 1872, which laid an important part of the city in ashes, the governor of the State con-

vened the legislative body of Massachusetts, called the General Court, for the express purpose of affording some relief to the city and its people from the sufferings consequent on this great calamity. A statute was passed, among others, which authorized the city to issue its bonds to an amount not exceeding twenty millions of dollars, which bonds were to be loaned, under proper guards for securing the city from loss, to the owners of the ground whose buildings had been destroyed by fire, to aid them in rebuilding.

In the case of *Lowell* v. *The City of Boston,* in the Supreme Judicial Court of Massachusetts, the validity of this act was considered. We have been furnished a copy of the opinion, though it is not yet reported in the regular series of that court. The American Law Review for July, 1873, says that the question was elaborately and ably argued. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving the right to tax other than for a public purpose.

The same court had previously decided, in the case of *Jenkins* v. *Andover,* (103 Mass. 741), that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

The same principle exactly was decided by the state court of Wisconsin in the case of *Curtis* v. *Whipple,* (24 Wis. 350). In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting* v. *Fond du Lac,* already cited, the principle is fully considered and reaffirmed.

These cases are clearly in point, and they assert a principle which meets our cordial approval.

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Judgment affirmed.

Mr. Justice Clifford dissenting.

LOWELL V. CITY OF BOSTON.

Supreme Judicial Court of Massachusetts. March, 1873.
111 Mass. 454.

WELLS, J. This is a proceeding under the provisions of the Gen. Sts., c. 18, § 79, to restrain the city of Boston from issuing its bonds for the purpose of raising a fund to be appropriated to the object of rendering aid, by way of loans, in rebuilding upon that portion of the city which was burned over in November, 1872. The issue of bonds for that purpose, to an amount not exceeding $20,000,000, was expressly authorized by the St. of 1872, c. 364. The question, therefore, is distinctly presented whether the authority thus conferred upon the city is contrary to the provisions of the Constitution of the Commonwealth.

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The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interest to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be benefited by their promotion.

The principle of this distinction is fundamental. It underlies all government that is based on reason rather than upon force. It is expressed in various forms in the Constitution of Massachusetts. In Art. XI of c. 2, § 1, by restricting the issuing of moneys from the treasury to purposes of "the necessary defence and support of the Commonwealth; and for the protection and preservation of the in-

habitants thereof, agreeably to the acts and resolves of the General Court." In Art. IV. of c. 1, § 1, by declaring the purposes for which the power of taxation, in its various forms, may be exercised by the General Court, to be "for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof." The purport and scope of these provisions are made more distinct, and the essential idea upon which they rest is disclosed by reference to the preceding Declaration of Rights, by which the theory and purpose of this frame of government were set forth by its founders. Art. X declares, "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent or that of the representative body of the people. In fine, the people of this Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

The power of the government, thus constituted, to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to wit, public uses and the public service. This power, when exercised in one form, is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to wit, the necessities of organized society; and in the end by which alone the exercise of either can be justified, to wit, some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will justify the exercise of these sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control each. An appropriation of money raised by taxation, or of prop-

erty taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway, is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and entrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation.

In the case of a highway, on the other hand, its direct purpose of public use, determines conclusively the question in support of the exercise, both of the right of eminent domain and of taxation, however trifling the advantage to the public compared with that to individuals. The extent or value of the public use, and the wisdom and propriety of the appropriation, are matters to be determined exclusively by the legislature, either directly or by its delegated authority. When the power exists it is not within the province of the court to interfere with its exercise, by any inquiry into its expediency.

The two instances, above referred to, illustrate the sense in which the furthering of the public good by promotion of the interests of many individuals, differs from a public service. A public service may or may not be productive, practically, of public advantage. Resulting advantage to the public does not of itself give to the means by which it is produced the character of a public service.

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. . . . . Such an appropriation of property [i. e. for a railway company] is justified and can only be justified, by the public service thereby secured in the increased facilities for transportation of freight and passengers, of which the whole community may rightfully avail itself. The franchises of the corporation are held charged with this duty and trust for the performance of the public service, for which they were granted. *Commonwealth* v. *Wilkinson,* 16 Pick. 175. *Same* v. *Boston & Maine Railroad,* 3 Cush. 25, 45. *Old Col-*

ony & Fall River Railroad Co. v. *County of Plymouth,* 14 Gray 155, 161.

This right of eminent domain is often allowed to be exercised in favor of private aqueduct companies. Here, too, the public service, intended as the object of the grant of the right, is obvious. And although the interests of the aqueduct company are ordinarily relied upon to secure the proper performance of the service, yet, in case of any failure or abuse, the obligation may doubtless be otherwise enforced. *Lumbard* v. *Stearns,* 4 Cush. 60.

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There is no public use or public service declared in the statute now under consideration, and we are of opinion that none can be found in the purposes of its provisions. By its terms the proceeds of the bonds, thereby authorized, are to be expended in loans to persons who are or may become owners of land in Boston, "the buildings upon which were burned by the fire in said Boston on the ninth and tenth days of November," 1872. The ultimate end and object of the expenditure, as indicated by the provisions of the statute itself, is "to insure the speedy rebuilding on said land."

The general result may indeed be thus stated collectively, as a single object of attainment; but the fund raised is intended to be appropriated distributively, by separate loans to numerous individuals, each one of which will be independent of any relation to the others, or to any general purpose, except that of aiding individual enterprise in matters of private business. The property thus created will remain exclusively private property, to be devoted to private uses at the discretion of the owners of the land; with no restriction as to the character of the buildings to be erected, or the uses to which they shall be devoted; and with no obligation to render any service or duty to the Commonwealth or to the city,—except to repay the loan,—or to the community at large or any part of it. If it be assumed that the private interests of the owners will lead them to reëstablish warehouses, shops, manufactories and stores; and that the trade and business of the place will be enlarged or revived by means of the facilities thus provided; still these are considerations of private interest and if expressly declared to be the aim and purpose of the act they would not constitute a public object in a legal sense.

As a judicial question the case is not changed by the magnitude of the calamity which has created the emergency; nor by the greatness of the emergency or the extent and importance of the interests to be promoted. These are considerations affecting only the propriety and expediency of the expenditure as a legislative question. If

the expenditure is in its nature such as will justify taxation under any state of circumstances it belongs to the Legislature exclusively to determine whether it shall be authorized in the particular case; and however slight the emergency or limited or unimportant the interests to be promoted thereby, the court has no authority to revise the legislative action.

On the other hand, if its nature is such as not to justify taxation in any and all cases in which the Legislature might see fit to give authority therefor, no stress of circumstances affecting the expediency, importance or general desirableness of the measure, and no concurrence of legislative and municipal action, or preponderance of popular favor in any particular case, will supply the element necessary to bring it within the scope of legislative power.

The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional powers of the Legislature; and the city cannot lawfully issue the bonds for the purposes of the act.

This discussion has, for obvious reasons, taken a somewhat wider range than was required for the decision of the case immediately before us. We have purposely confined it to the consideration of judicial decisions and utterances in Massachusetts; because the question is of legislative power under the Constitution of this Commonwealth. The recent decision of the Supreme Judicial Court of Maine however, in the case of *Allen* v. *Jay,* 60 Maine, 124, to which we are referred, is of especial significance and importance from the similarity in the organic law of the two states and the almost exact identity of the question presented by the facts. It fully sustains the conclusions to which we have been led in this case.

Demurrer overruled. Injunction ordered.

UNITED STATES V. REALTY COMPANY.
UNITED STATES V. GAY.

Supreme Court of the United States. October, 1895.
163 United States 427.

Mr. Justice PECKHAM delivered the opinion of the court.

These are writs of error to the Circuit Court of the United States for the Eastern District of Louisiana. The actions were brought in that court under the second section of the act approved March 3,

1887, c. 359, 24 Stat. 505, commonly known as the Tucker act. Both actions were brought to obtain payment of moneys by reason of the legislation of Congress in regard to sugar bounties. The court below in each case gave judgment for the plaintiffs therein, and the government by writ of error brings the cases here for review.

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Counsel for the government admit that the plaintiff in each case has complied with all the terms and conditions of the act in order to entitle each to recover the moneys demanded in these suits under the act of 1895, provided that act is constitutional and valid. If it be, the judgment in each case must be affirmed.

The proper disbursing officer of the Treasury refused to pay the warrants drawn upon the treasury in these cases upon the sole ground that the act is unconstitutional. He has been fortified in his opinion and action by the views expressed in the Court of Appeals of the District of Columbia, in the case of the *United States ex rel. Miles Planting & Manufacturing Co.* v. *Carlisle,* reported in 5 D. C. App. 138. That company, which was a Louisiana corporation engaged in the sugar business, claimed that the repealing portion of the act of August 28, 1894, was not effective so as to cut off the rights of persons who had prior to its passage procured licenses for the fiscal year beginning July 1, 1894, and had expended money thereunder. The company therefore applied to the Supreme Court of the District of Columbia for a writ of mandamus against the Secretary of the Treasury and the Commissioner of Internal Revenue to compel action on their part under the act of 1890. The application was resisted by the government upon several grounds, among others, that the bounty legislation of 1890 was unconstitutional. The motion was denied upon all the grounds set up by the government, including that of unconstitutionality. Mr. Justice Shepard delivered the opinion of the court and Mr. Justice Morris concurred with him upon all points. Mr. Chief Justice Alvey expressed no opinion upon the constitutional question because the conclusion that Congress had power to repeal the provision giving the bounty for sugar rendered it unnecessary to pass upon the unconstitutionality of the original bounty clause.

It was by reason of this opinion upon the validity of the bounty legislation of 1890 that the Comptroller of the Treasury reëxamined the rulings which had been previously made in approving bounty claims theretofore presented; and he had concluded to and did refer another case involving this question, then before him, to the Court of Claims for its decision in accordance with the provisions of section 1063 of the Revised Statutes, but before the case reached the Court

of Claims the present cases had been commenced and decided in Louisiana.

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In the view we take of these cases the rights of the parties may be passed upon and actions finally decided without our entering upon a discussion as to the validity of the bounty legislation contained in the act of 1890, and without deciding that question. For the purpose of the discussion of this case we think it unnecessary to decide whether or not such legislation is beyond the power of Congress. We are of opinion that in either case the appropriations of money in the act of 1895 to be paid to certain manufacturers and producers of sugar who had complied with the act of 1890 were within the power of Congress to make, and were constitutional and valid.

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The production and manufacture of sugar in the Southern and some portions of the Western States from sugar cane and from sorghum and beets had become at the time of the passage of the act of 1890 an industry in which large numbers of the citizens of this country were engaged, and its prosecution involved the use of a very large amount of capital. The tariff theretofore had been very high upon imported sugar, and the native industry had thereby been encouraged, fostered and greatly increased. The subject of how to treat this industry was under discussion in Congress while the tariff act of 1890 was before it, and it finally decided the question by enacting the bounty clause of that act. Before that time the revenue on imported sugar had amounted to nearly $60,000,000 in one year. To put sugar on the free list would reduce the revenue that amount, but at the same time it might, as was urged in Congress ruin the persons engaged in the industry in this country. So the tariff on sugar was reduced while at the same time a bounty was placed upon its production here of an amount which it was thought would equal the protection the industry had theretofore enjoyed under the tariff. The act was approved by the President and no question of its validity was made by any officer of the government having any duties to perform under it. The bounty provision was by the terms of the act to remain in force for fifteen years. The citizens who were engaged in the manufacture of sugar prepared to comply with the provisions of the law under which the bounty was to be payable.

Under that act and during its existence large sums of money were paid to sugar manufacturers as a bounty, and all manufacturers continued to manufacture in reliance upon its provisions. During these years no officer of the government questioned the validity of the act.

and the bounties earned under it were paid without objection or any hint that objection would thereafter be taken while the law was in force. This condition continued for about three years. In the winter, spring and summer of 1894 it is matter of history that the discussion of the tariff act, which finally became a law on the 28th of August of that year, was continually going on in Congress and through the public prints of the country. Before the passage of the act it was, of course, wholly uncertain as to what its provisions would be, including the question of the bounty for the manufacture of sugar. No man could predict it. No one could have stated whether the bounty would be taken off entirely or materially reduced, or left as it stood by the act of 1890. The whole question of tariff legislation at that time was full of uncertainty. In the meantime the season was approaching when the manufacturer of sugar must decide what to do. He was confronted with the fact that the act of 1890 was still in existence, and under its provisions he must, if he meant to avail himself of the bounties which might be payable under the act, make his application for and obtain a license prior to July 1 of that year. . . . . . At the same time, if he made application and obtained his license and commenced the manufacture of sugar under the provisions of the act of 1890, he could not be certain that the act of Congress might not strike out altogether the provision for the payment of any bounty and he be left in such a condition that he could neither manufacture with profit nor abstain from manufacturing without loss. All this by no fault of his; doing his very best, exerting his every energy, sleeplessly vigilant at all points, it was yet impossible for him to decide what to do in this state of uncertainty, or even to guess which would be the road least liable to lead to great pecuniary loss, if not to ruin. Already embarked in the business and in this state of uncertainty, the manufacturer finally coucludes to go on as if the act were to remain in existence, feeling probably a firm reliance that the government would not treat its citizens unjustly or unfairly by a sudden repeal of the bounty law without making such temporary provision of another nature by which justice would be done him. He applied for a license and commenced his preparations, as the then existing act of 1890 provided that he might do. Making his arrangements for the prospective year and preparing for the manufacture of sugar during that time, the manufacturer is, subsequently, confronted by the act of Congress taking effect August 28, 1894, totally repealing the provisions of the act of 1890 upon the subject of bounties and prohibiting from that time the payment thereof. This was the position of the plaintiff, Mr. Gay,

and of large numbers of other people. The Realty Company occupied a still more unfortunate position. That company had manufactured sugar between the first of July, 1893, and the first of July, 1894, during the whole of which period the act of 1890 was in full force and after July 1st, 1894, the company obtained the warrants, duly certified and authenticated by the local government officers in Louisiana, for the payment of its claim to bounty, but before actual payment from the Treasury of the United States could be obtained the act of 1894 came into existence, with its provision directing that no further payment of bounty should thereafter be made. Of course, under the circumstances, as set forth in regard to the plaintiffs in the above suits, there can be and is no question made as to the entire good faith of all parties, and the question presented to this court is one of constitutional power simply.

This condition of affairs confronted the Congress which passed the appropriation in question. It is now argued by counsel for the government that Congress had no valid power to recognize these claims against the United States made by the sugar manufacturers, because the provision in regard to the payment of bounties contained in the act of 1890 is unconstitutional.

Upon this assumption it is said that no claim, legal, moral, equitable or honorable can be created in favor of the sugar manufacturer and against the government, and that where there is neither legal, moral nor honorable obligation to pay, Congress has no power to appropriate money.

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We are of opinion that the parties, situated as were the plaintiffs in these actions, acquired claims upon the government of an equitable, moral or honorary nature. Could Congress legally recognize and pay them although the act of 1890 as to its bounty provisions might be unconstitutional? It is true that in general an unconstitutional act of Congress is the same as if there were no act. That is regarding it in its purely legal aspect. Being in violation of the Constitution, that instrument must govern, and no one can base any legal claim as arising out of such an act. That is a very different principle, however, from that which we think governs in this case. The persons for whose benefit the appropriation contained in the act of 1895 was made are not, in the view we take, asserting the existence of a legal and valid debt against the United States which is at the same time based upon an unconstitutional act of Congress. No such inconsistent and illogical position is taken. They are asserting that by reason of the occurrences which took place before the appropria-

tion, among which was the passage of the act of 1890, they were so placed before Congress as to authorize that body to recognize the equities of the situation, and to pay their claims which, while they were not of a legal character, were nevertheless of so meritorious and equitable a nature as to authorize the nation through its Congress to appropriate money to pay them.

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There was enough in the case as presented to Congress upon which to base the assertion that there was a moral and honorable claim upon the public treasury which that body had the constitutional right to recognize and pay.

Under the provisions of the Constitution, (article 1, section 8) Congress has power to lay and collect taxes, etc., "to pay the debts of the United States." Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded and indeed it cannot be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term "debt" includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recovered in a court of law if existing against an individual. The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of the acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one

of the counsel for the defendants in error. The acts are referred to not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of Congress since the adoption of the Constitution. See, also, among other cases in this court, *Emerson* v. *Hall*, 13 Pet. 409; *United States* v. *Price*, 116 U. S. 43; *Williams* v. *Heard*, 140 U. S. 529. The last cited case arose under an act of Congress in relation to the Alabama claims.

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The power to provide for claims upon the State founded in equity and justice has also been recognized as existing in the state governments. For example, in *Guilford* v. *Chenango County*, 13 N. Y. 143, it was held by the New York court of appeals that the legislature was not confined in its appropriation of public moneys to sums to be raised by taxation in favor of individuals to cases in which legal demands existed against the State, but that it could recognize claims founded in equity and justice in the largest sense of these terms or in gratitude or in charity.

Of course, the difference between the powers of the State legislatures and that of the Congress of the United States is not lost sight of, but it is believed that in relation to the power to recognize and to pay obligations resting only upon moral considerations or upon the general principles of right and justice, the Federal Congress stands upon a level with the state legislature.

In truth, the general proposition that Congress can direct the payment of debts which have only a strong moral and honorable obligation for their support is not, as we understand it, denied by the learned counsel for the United States; but it is claimed that in these cases no foundation whatever is laid for its application, because the claims arise out of the unconstitutional provisions of the act giving bounties in 1890. It is impossible, it is said, to build even an equity out of an act of Congress which is utterly void; that as the original act offering and paying bounties was void, it cannot become legal to pay them because of any alleged equities of those who would suffer from their sudden discontinuance as set forth in these cases. For the reasons already given we do not think, under the circumstances surrounding these cases, that the validity of the act of 1895, can be questioned successfully.

In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be

one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject for review by the judicial branch of the government. Upon the general principle, therefore, that the government of the United States, through Congress, has the right to pay the debts of the United States, and that the claims in these cases are of a nature which that body might rightfully decide to constitute a debt payable to the United States upon considerations of justice and honor, we think the act of Congress making appropriations for the payment of such claims was valid without reference to the question of the validity or invalidity of the original act providing for the payment of bounties to manufacturers of sugar, as contained in the tariff act of 1890. The judgments in these cases are right, irrespective of how that question might be decided, or of any conclusion that might be reached upon other questions suggested at the bar.

The judgments are, therefore,

Affirmed.

Mr. Justice WHITE did not sit in nor take any part in the decision of these cases.

CHAPTER V.

THE PURPOSE MUST PERTAIN TO THE DISTRICT TAXED.

I. Discretion of the Legislature.

GORDON, APPELLANT, VS. CORNES ET AL. RESPONDENTS.

Court of Appeals of New York. March, 1872.
47 New York 608.

Appeals from judgments of the General Term of the supreme court in the seventh judicial district, affirming judgments for defendants entered upon reports of a referee.

The actions were in trespass for taking certain personal property of plaintiffs, who were taxpayers and residents in the village of Brockport, Monroe county. Defendant, Williams was the tax collector, and the other defendants were trustees of said village.

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Rapallo, J. The appellants in these actions claim that the act of the legislature authorizing the tax for the collection of which their property was levied upon, was unconstitutional, and that, therefore, the trustees who issued the warrant, and the collector who attempted to execute it were guilty of a trespass.

The act in question was passed March 19, 1867 (Laws of 1867, chap. 96), and empowered the trustees of the village of Brockport to raise the money necessary to carry into effect certain proposals which they had made pursuant to chapter 466 of the Laws of 1866, for the establishment of a normal and training school in that village, which proposals had been accepted, and to that end to levy and collect taxes from time to time, as they might deem necessary, but not exceeding $50,000 in the aggregate.

The first alleged ground of objection to the validity of this act is, that the institution for which the money was to be raised was not a local one, but was for the equal benefit of the whole State, and that the assessment ought to be imposed with equality upon all property within the State.

There can be no doubt of the correctness of the general proposi-

tion, that the principle upon which taxation is founded is that the tax-payer is supposed to receive just compensation in the benefits conferred by government, and in the proper application of the tax; and that in the exercise of the taxing power the legislature ought, as nearly as practicable, to apportion the tax according to the benefit which each tax-payer is supposed to receive from the object upon which the tax is expended.

But the power of apportionment is included in the power to impose taxes, and is vested in the legislature; and in the absence of any constitutional restraint, the exercise by it of such power of apportionment cannot be reviewed by the courts. (*The People* v. *The Mayor, etc.*, 4 Comst. 419.) The constitutions of some of our sister States contain special provisions designed to guard against an inequitable exercise of this power, and to secure equality in the distribution of the public burdens. A violation of any such provisions would undoubtedly be cognizable by the courts. But in this State such restraints have not been deemed necessary, and the people have been content to leave to the wisdom and justice of the legislature, unrestrained by specific regulations, the subject of determining how the public burdens shall be apportioned among them. (*Prov. Bank* v. *Billings*, 4 Peters 514, 561, 563; 4 Coms. 426, 427, 429; *Thomas* v. *Leland*, 24 Wend. 65; *Town of Guilford* v. *Supervisors of Chenango*, 13 N. Y. 143; *Bank of Rome* v. *Village of Rome*, 18 N. Y. 38; *Brewster* v. *City of Syracuse*, 19 N. Y. 116.)

To undertake to review the action of the legislature in this respect, and to enforce by judicial power, absolute equality of taxation, or to declare a law unconstitutional on the ground that the locality is taxed for what might seem to the court more than its just proportion for an expenditure for a public purpose, would be an usurpation of the province of the legislature. (4 Comst. 426; *Darlington* v. *The Mayor*, 31 N. Y. 190.)

It would be going too far to deny that the provisions of the Constitution, which declare that no person shall be deprived of property, without due process of law, and that private property shall not be taken for public use without just compensation, would afford protection to the citizens against impositions made nominally in the form of taxes, but which were in fact forced levies upon individuals or confiscations of private property; as for instance, if the general expenses of the government of the State, or of one of its municipal divisions, should be levied upon the property of an individual or set of individuals, or perhaps upon a particular district. Cases of this description might be imagined in which an act would fall within the

express prohibitions of the Constitution. But to raise the constitutional question would require an extreme case, where no apportionment of the tax with reference to benefit should be attempted, and no discretion on the subject exercised, but one set of individuals or one district should be confessedly and arbitrarily required to pay for benefits conferred upon others who bore no proportion of the burden. No such question arises where a tax is imposed upon a particular locality to aid in a public purpose which the legislature may reasonably regard as a benefit to that locality as well as to the State at large. When the legislature has proceeded upon the ground of such mutual benefits, and has undertaken to make the apportionment, inequality in the apportionment of the expenses of the undertaking, with reference to the benefits resulting respectively to the State and to the locality, cannot be alleged for the purpose of impugning the validity of the act.

The normal school in question was to be established pursuant to chapter 466 of the Laws of 1866, for the education of teachers for the common schools. The village was, according to the proposals made by the trustees, to furnish the land and buildings required, and to supply furniture to the school to a specified amount. These were to be conveyed to the State and placed under the control and direction of its officers, and the school was to be managed by a local board appointed by the superintendent of public instruction. The village, however, did not undertake to defray any part of the expense of conducting or maintaining the school or any of its departments, and the act plainly implies that these expenses are to be borne by the State. No provision is made by the proposals for any contribution by the village to these expenses, nor is any tax authorized for that purpose by the act of 1867. It also appears that it was a part of the project that there should be a grammar school attached, which was to be free to all children of proper acquirements living in the village. By the act of 1866 the normal scholars were to be selected under the direction of the superintendent of public instruction, who was to provide that every part of the State should have its proportionate representation according to population; but if any district should not be fully represented, preference was to be given, in supplying the deficiency to those residing in the village where the school was located.

From this brief summary of the project, it is apparent that the establishment of the school may well have been deemed by the legislature a benefit to the locality, as well as to the State at large, and the furnishing of the land, buildings and furniture by the village,

may have been considered no more than its just contribution toward such benefit. We cannot say, judicially, that the establishment of this school was so foreign to the interests of the inhabitants of the village that it was beyond the legislative power to authorize the village to contribute toward its establishment. (*Bank of Rome* v. *The Village of Rome,* 18 N. Y. 43.) Without regard, therefore, to the fact that the school was established on the application of the trustees of the village, and to the question raised by the counsel for appellant, that none but the tax-payers themselves could give a valid consent to the assumption of the burden, we think that the case discloses no want of power in the legislature to direct the levy of the tax authorized by the act of 1867.

We have examined the cases of *Morford* v. *Unger,* (8 Iowa R. 82); *Ryerson* v. *Utley,* (16 Mich. 269); and *Hammatt* v. *The City of Philadelphia,* (8 Am. Law Reg. U. S., 411); to which we have been referred on the part of the appellant. The case of *Morford* v. *Unger* follows the cases of *Wells* v. *The City of Weston,* (22 Miss. 385); *Cheany* v. *Horsec,* (9 B. Monroe 330); and *City of Covington* v. *Southgate,* (15 B. Monroe 491), which holds that the legislature cannot authorize a municipal corporation to tax, for its own local purposes, land lying beyond its corporate limits, and that an act extending the corporate limits so as to embrace agricultural land at a distance, not needed for city purposes, but only for the purpose of subjecting it to taxation, is a mere pretext, and an invasion of private property under color of the power of taxation. The case of *Ryerson* v. *Utley* rests, in part at least, upon a provision of the State Constitution, the effect of which is to take from the legislature the power of taxation for internal improvements. *Hammatt* v. *The City of Philadelphia* holds an act unconstitutional which authorized an assessment on lots fronting on a street for repaving the street, after it had once been opened and paved, on the ground that such repaving was for the benefit of the general public. That decision goes farther than has ever been attempted in this State, and conflicts with the general course of adjudication here upon similar assessments. We find nothing in any of these cases to induce us to vary our conclusion as to the act now in question.

. . . .

The judgments should be affirmed with costs.

All concur except CHURCH, Ch. J., not voting.

Judgment Affirmed.

THOMAS V. LELAND ET AL.

Supreme Court of New York. May, 1840.
24 Wendell 65.

Cowen, J. It is objected by the counsel for the plaintiff, first, that the statute of 1835 sought to take the plaintiff's property without his consent, and appropriate it to the payment of a private debt due from others; and that such a statute is unconstitutional and void. The consequence is not denied by the counsel for the defendants, who insists that the statute is, in effect, no more than any of our ordinary acts imposing local taxes for local improvements of a public character, such as highways and bridges. The object of the statute, and the share of individual or public concern in the tax, may be collected from the acts mentioned in the pleas, and more fully, when connected with the bond set forth in the replication to the second plea of the defendant Mason. Some time previous to March, 1834, the canal commissioners, thinking that the Chenango canal then in progress of construction, might be more economically connected with the great western canal at Whitesborough than at the city of Utica, had fixed on the former place for its termination. Then came the act of March 24th, 1834, authorizing the commissioners, on the extraordinary expense of a termination at Utica being provided by those more immediately interested, to change the termination to the latter place. Hereupon several individuals, either from public spirit, or in respect to their own profit, joined in a bond to the people, conditioned to pay into the treasury, for the benefit of the canal fund, $38,615, the estimated excess, and so much more as should make good the contracts affected by the change. Thereupon the contemplated change was made. Afterwards, on the 11th May, 1835, the legislature deeming the debt thus contracted by individuals, unreasonably partial and onerous, passed the statute now in question, the object of which was to levy the tax on the owners of real estate in the city of Utica. The general purpose of raising the money by tax was, therefore, to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as such; and, independently of the bond, the case is the ordinary one of local taxation to make or improve a highway. If such an act be otherwise constitutional, we do not see how the circumstance that a bond had been before given securing the same money, can detract from its validity. Should an individual volunteer to secure a sum of money in itself properly leviable by way of tax on a town or county, there would be nothing in the nature of

such an arrangement, which would preclude the legislature from resorting, by way of tax, to those who are primarily, and more justly liable. Even should he pay the money, what is there in the constitution to preclude his being reimbursed by a tax?

But, secondly, it is said that, if the act had in view the construction of the canal, then it was unconstitutional, as seeking to take private property for public use, without just compensation, or any compensation. To sustain this argument, it must be denied that the general profit of the community to which we belong will warrant a tax affecting our property. One answer in the case at bar is, that the improvement in question, was, in itself, a compensation to the plaintiff. Such, at any rate, was the theory of the proceeding, and we must intend that it was carried out in practice. Such was the view taken by the legislature; and they must be left to judge of the compensation.

But the argument proves quite too much. It would go to cut off entirely many acknowledged powers of taxation; such as that which raises money to relieve the poor, or establish and keep on foot common schools, to build bridges, or work the highway. It confounds two distinct legislative powers; a simple power of taxation, with the power of taking private property for public use. The former acts upon communities and may be exerted in favor of any object which the legislature shall deem for the public benefit. A tax to build a lunatic asylum, may be mentioned as one instance. If the power to impose such a tax were to be rested on the ground of individual pecuniary benefit to each one who should be called on to contribute, it is quite obvious that it would not be maintained for a moment. Yet who would doubt that such might be imposed on a local community, a county, or even a town? I admit that this power of taxation may be abused; but its exercise cannot be judicially restrained so long as it is referable to the taxing power. The only check lies at present in that power being usually exerted on considerable bodies of men, who possess a control in a greater or less degree over its agents.

Judgment for the defendants.

If the purpose of the tax is one for which the legislature may constitutionally authorize a tax, it may as a rule oblige a local corporation to levy the tax. See Perkins v. Slack, 86 Pa. St. 283; Philadelphia v. Field, 58 Pa. St. 320; Guilford v. Supervisors 13 N. Y. 143; but see People v. Detroit 28 Mich. 228; People v. Batchellor, 53 N. Y. 128.

2. *Jurisdiction over property.*

ST. LOUIS V. FERRY COMPANY.

Supreme Court of the United States. December, 1870.
11 Wallace 423.

Mr. Justice SWAYNE delivered the opinion of the court.

The plaintiff in error instituted five suits in the St. Louis Circuit Court for the recovery of taxes alleged to be due from the ferry company to the city. Upon the petition of the company they were removed into the Circuit Court of the United States for that district. In that court, by the consent of the parties, the causes were consolidated and thereafter proceeded to trial as one case. The counsel upon both sides entered into a written stipulation waiving a jury and the cause was submitted to the court, pursuant to the act of Congress of March 3d, 1865. The court found the facts specially, and the finding is a part of the record. Judgment was given for the defendant. The city excepted and has brought the case here for review.

. . . .

The controversy relates to taxes imposed by the city upon the ferry-boats of the defendants, used in conveying freight and passengers across the Mississippi River between the city of St. Louis and the opposite Illinois shore.

. . . .

It has been said that the power of taxation for the purposes of the commonwealth is a part of all governmental sovereignty and is inseparable from it. It is for the legislature to decide what persons and property shall be reached by the exercise of this function and in what proportions and by what processes and instrumentalities taxes shall be assessed and collected. The authority extends over all persons and property within the sphere of its territorial jurisdiction.

. . . .

Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action.

17

In the eye of the law personal property, for most purposes, has no locality. *Mobilia sequuntur personam; immobilia situm. Mobilia non habent sequelam.* In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. If he die intestate, that law, wheresoever the property may be situate, governs its disposal, and fixes the rights and shares of the several distributees. (Story's Conflict of Laws § 379; Broom's Maxims, 501, 502; In re Ervin, 1 Crompton & Jervis 156.) But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual *situs,* and the requisite legislative jurisdiction exists. Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality. (*International Life Ass. Co.* v. *Coms.* 28 Barbour 318; *Hoyt* v. *Coms.* 23 Id. 228; Story's Conflict of Laws, 550.) The personal property of a resident at the place of his residence is liable to taxation, although he has no intention to become domiciled there. (*Finley* v. *Philadelphia* 32 Pa. St. 381.) Whether the personal property of a resident of one State situate in another can be taxed in the former, is a question which in this case we are not called upon to decide. (*Wilson* v. *The Mayor* 4 E. D. Smith 675; *Hoyt* v. *The Coms.* 23 N. Y. 228.)

Upon looking into the enactments under which the taxes in question were assessed, it is obvious that their purpose was not to tax the property through the proprietor, but to tax the things themselves by reason of their being "within the city." The point for us to decide, therefore, is, whether they are covered by the legal provisions under which the taxes were imposed. If the taxing officer acted without authority the taxes were invalid, and the city is not entitled to recover in this action.

The boats were enrolled at the city of St. Louis, but that throws no light upon the subject of our inquiry. The act of 1789, section 2, and the act of 1792, section 3, (1 Stat. at Large, 55 and Ib. 287) require every vessel to be registered in the district to which she belongs and the fourth section of the former act, and the third section of the latter, declares that her home port shall be that at or near which her owner resides. The solution of the question, where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrollment. (3 Kent, 133, 170, *Hill* v. *The Golden Gate,* Newberry 308; *S. B. Superior* Ib. 181; *Jordan v. Young* 37 Me. 276.)

. . . .

The court found that the boats, "when not in actual use, were

laid up by the Illinois shore, and were forbidden, by a general ordinance of the city of St. Louis regulating ferries and ferry-boats, to remain at the St. Louis wharf or landing longer than ten minutes at a time." A tax was paid upon the boats in Illinois. Their relation to the city was merely that of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum of the stay they were permitted to make at any one time. The owner was, in the eye of the law, a citizen of that State, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances must be taken to be their home port. They did not so abide within the city as to become incorporated with and form a part of its personal property. (*Hays* v. *Pac. Steamship Co.* 17 Howard 599; *City of Albany* v. *Meekins* 3 Ind. 481.) Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained. (*Railroad Co.* v. *Jackson,* 7 Wallace, 262.) In our opinion the facts found are sufficient to support the judgment.

. . . .

Judgment affirmed.

See also Hays v. Pacific Mail Steamship Co. 17 How. 596; Morgan v. Parham, 16 Wallace 477.

SAVINGS AND LOAN SOCIETY V. MULTNOMAH COUNTY.

Supreme Court of the United States. March, 1898.
169 United States, 421.

Mr. Justice GRAY delivered the opinion of the court.

This was a bill in equity filed in the Circuit Court of the United States for the District of Oregon, by the Savings and Loan Society, a corporation and citizen of the State of California, against Multnomah County, a public corporation in the State of Oregon, and one Kelly, the sheriff and *ex officio* the tax collector of that county, and a citizen of that State, showing that in 1891 and 1892 various persons, all citizens of Oregon, severally made their promissory notes to secure the payment of various sums of money, with interest, to the

plaintiff at its office in the City of San Francisco and State of California, amounting in all to the sum of $531,000; and, to further secure the same debts, executed to the plaintiff mortgages of divers parcels of land owned by them in Multnomah County; that the mortgages were duly recorded in the office of the recorder of conveyances of that county; that the notes and mortgages were immediately delivered to the plaintiff, and had ever since been without the State of Oregon, and in the possession of the plaintiff at San Francisco; that afterwards, in accordance with the statute of Oregon of October 26, 1882, taxes were imposed upon all the taxable property in Multnomah county, including the debts and mortgages aforesaid; that, the taxes upon these debts and mortgages not having been paid, a list thereof was placed in the hands of the sheriff, with a warrant directing him to collect the same as upon execution, and he advertised for sale all the debts and mortgages aforesaid; and that the statute was in violation of the Fourteenth Amendment of the Constitution of the United States, as depriving the plaintiff of its property without due process of law, and denying to it the equal protection of the laws. The bill prayed for an injunction against the sale; and for a decree declaring that the statute was contrary to the provisions of the Constitution of the United States and therefore of no effect, and that all the proceedings before set out were null and void; and for further relief.

The defendants demurred generally; and the court sustained the demurrer, and dismissed the bill. 60 Fed. Rep. 31. The plaintiff appealed to this court.

The ground upon which the plaintiff seeks to maintain this suit is that the tax act of the State of Oregon of 1882, as applied to the mortgages, owned and held by the plaintiff in California, of lands in Oregon, is contrary to the Fourteenth Amendment of the Constitution of the United States, as depriving the plaintiff of its property without due process of law, and denying to it the equal protection of the laws.

The statute in question makes the following provisions for the taxation of mortgages: By § 1, "a mortgage, deed of trust, contract or other obligation whereby land or real property, situated in no more than one county in this State, is made security for the payment of a debt, together with such debt, shall, for the purposes of assessment and taxation, be deemed and treated as land or real property." By § 2, the mortgage, "together with such debt, shall be assessed and taxed to the owner of such security and debt in the county, city or district in which the land or real property affected by

such security is situated;" and may be sold, like other real property, for the payment of taxes due thereon. By § 3, that person is to be deemed the owner, who appears to be such on the record of the mortgage, either as the original mortgagee, or as an assignee by transfer made in writing upon the margin of the record. By § 4, no payment on the debt so secured is to be taken into consideration in assessing the tax, unless likewise stated upon the record; and the debt and mortgage are to be assessed for the full amount appearing by the record to be owing, unless in the judgment of the assessor the land is not worth so much, in which case they are to be assessed at their real cash value. By §§ 5, 6, 7, it is made the duty of each county clerk to record, in the margin of the record of any mortgage, when requested so to do by the mortgagee or owner of the mortgage, all assignments thereof and payments thereon; and to deliver annually to the assessor abstracts containing the requisite information as to unsatisfied mortgages recorded in his office. By § 8, a debt secured by mortgage of land in a county of this State "shall, for the purpose of taxation, be deemed and considered as indebtedness within this State, and the person or persons owing such debt shall be entitled to deduct the same from his or their assessments in the same manner that other indebtedness within the State is deducted."

. . . .

The statute applies only to mortgages of land in not more than one county. . . . . . The mortgages now in question were all made since the statute, and were of land in a single county; and it is not suggested in the bill that there existed any untaxed mortgage of lands in more than one county.

The statute, in terms, provides that "no promissory note or other instrument in writing, which is the evidence of" the debt secured by the mortgage, "shall be taxed for any purpose within this State;" but that the debt and mortgage "shall, for the purposes of assessment and taxation, be deemed and treated as land or real property" in the county in which the land is situated, and be there taxed, not beyond their real cash value, to the person appearing of record to be the owner of the mortgage.

The statute authorizes the amount of the mortgage debt to be deducted from any assessment upon the mortgagor; and does not provide for both taxing to the mortgagee the money secured by the mortgage, and also taxing to the mortgagor the whole mortgaged property, as did the statutes of other States, the validity of which was affirmed in *Augusta Bank* v. *Augusta*, 36 Maine, 255, 259; *Ala-*

bama Ins. Co. v. *Lott,* 54 Alabama, 499; *Appeal Tax Court* v. *Rice,* 50 Maryland, 302; and *Goldgart* v. *People,* 106 Illinois, 25.

The right to deduct from his assessment any debts due from him within the State is secured as well to the mortgagee, as to the mortgagor, by a provision of the statute of Oregon of October 25, 1880, (unrepealed by the statute of 1882, and evidently assumed by § 8 of this statute to be in force), by which "it shall be the duty of the assessor, to deduct the amount of indebtedness, within the State, of any person assessed, from the amount of his or her taxable property." Oregon Laws of 1880, p. 52; Hill's Code, § 2752.

Taking all the provisions of the statute into consideration, its clear intent and effect are as follows: The personal obligation of the mortgagor to the mortgagee is not taxed at all. The mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee, not beyond their real cash value and only so far as they represent an interest in the real estate mortgaged. The debt is not taxed separately, but only together with the mortgage; and is considered as indebtedness within the State for no other purpose than to enable the mortgagor to deduct the amount thereof from the assessment upon him, in the same manner as other indebtedness within the State is deducted. And the mortgagee, as well as the mortgagor, is entitled to have deducted from his assessment the amount of his indebtedness within the State.

The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation. Nor is any such discrimination made between mortgagors and mortgagees, or between resident and non-resident mortgagees, as to deny to the latter the equal protection of the laws.

. . . .

The case, then, reduces itself to the question whether this tax act, as applied to mortgages owned by citizens of other States and their possession outside of the State of Oregon, deprives them of their property without due process of law.

By the law of Oregon, indeed, as of some other States of the Union, a mortgage of real property does not convey the legal title to the mortgagee, but creates only a lien or incumbrance as security for the mortgage debt; and the right of possession, as well as the legal title, remains in the mortgagor, both before and after condition broken, until foreclosure. Oregon General Laws of 1843-1872, § 323; Hill's Code, § 326; *Anderson* v. *Baxter,* 4 Oregon 105, 110; *Semple* v. *Bank of British Columbia,* 5 Sawyer 88, 394; *Teal* v. *Walker,*

111 U. S. 242; *Sellwood* v. *Gray,* 11 Oregon 534; *Watson* v. *Dundee Mortgage Co.,* 12 Oregon 474; *Thompson* v. *Marshall,* 21 Oregon 171; *Adair* v. *Adair,* 22 Oregon 115.

Notwithstanding this, it has been held, both by the Supreme Court of the State, and by the Circuit Court of the United States for the District of Oregon, that the State has the power to tax mortgages, though owned and held by citizens and residents of other States, of lands in Oregon. *Mumford* v. *Sewell,* 11 Oregon 67; *Dundee Mortgage Co.* v. *School District,* 10 Sawyer 52; *Crawford* v. *Linn County,* 11 Oregon 482; *Dundee Mortgage Co.* v. *Parrish,* 11 Sawyer 92; *Poppleton* v. *Yamhill County,* 18 Oregon 377, 383; *Savings & Loan Society* v. *Multnomah County,* 60 Fed. 31.

. . . .

The authority of every State to tax all property, real and personal, within its jurisdiction, is unquestionable. *McCulloch* v. *Maryland,* 4 Wheat. 316, 429. Personal property, as this court has declared again and again, may be taxed, either at the domicil of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the State which imposes the tax. *Tappan* v. *Merchants' Bank,* 19 Wall. 490, 499; *State Railroad Tax cases,* 92 U. S. 575, 607; *Coe* v. *Errol,* 116 U. S. 517, 524; *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22, 27. The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in action, to the creditor at his domicil; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its *situs*. *Firemen's Ins. Co.* v. *Commonwealth,* 137 Mass. 80, 81; *State* v. *Runyon,* 12 Vroom, (41 N. J. Law), 98, 105; *Darcy* v. *Darcy,* 22 Vroom, (51 N. J. Law), 140, 145; *People* v. *Smith,* 88 N. Y. 576, 585; *Common Council* v. *Assessors,* 91 Michigan 78, 92.

The plaintiff much relied on the opinion delivered by Mr. Justice Field in *Cleveland, Painesville & Ashtabula Railroad* v. *Pennsylvania,* reported under the name of *Case of the State Tax on Foreign-Held Bonds,* 15 Wall. 300, 323. It becomes important therefore to notice exactly what was there decided. In that case, a railroad company, incorporated both in Ohio and in Pennsylvania, had issued bonds secured by a mortgage of its entire road in both

States; and the tax imposed by the State of Pennsylvania, which was held by a majority of this court to be invalid, was a tax upon the interest due to the bondholders upon the bonds, and was not a tax upon the railroad, or upon the mortgage thereof, or upon the bondholders solely by reason of their interest in that mortgage. The remarks in the opinion, supported by quotations from opinions of the Supreme Court of Pennsylvania, that a mortgage, being a mere security for the debt, confers upon the holder of the mortgage no interest in the land, and when held by a non-resident is as much beyond the jurisdiction of the State as the person of the owner, went beyond what was required for the decision of the case, and cannot be reconciled with other decisions of this court and of the Supreme Court of Pennsylvania.

This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land, as will defeat the priority given to the United States by act of Congress in the distribution of the debtor's estate. *United States* v. *Hooe,* 3 Cranch 73; *Thelusson* v. *Smith,* 2 Wheat. 396, 426; *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 386, 441.

. . . .

In *Kirtland* v. *Hotchkiss,* 42 Conn. 426, affirmed by this court in 100 U. S. 491, the point adjudged was that debts to persons residing in one State, secured by mortgage of land in another State, might, for the purposes of taxation, be regarded as situated at the domicile of the creditor. But the question, whether the mortgage could be taxed there only, was not involved in the case, and was not decided, either by the Supreme Court of Connecticut or by this court.

10 Sawy. 431

In many other cases cited by the appellant, there was no statute expressly taxing mortgages at the *situs* of the land; and, although the opinions in some of them took a wider range, the only question in any of them was one of the construction, not of the constitutionality, of a statute—of the intention, not of the power of the legislature. Such were: *Davenport* v. *Mississippi & Missouri Railroad,* 12 Iowa 539; *Latrobe* v. *Baltimore,* 19 Maryland 13; *People* v. *Eastman,* 25 California 601; *State* v. *Earl,* 1 Nevada 394; *Arapahoe* v. *Cutter,* 3 Colorado 349; *People* v. *Smith,* 88 N. Y. 576; *Grant* v. *Jones,* 39 Ohio St. 506; *State* v. *Smith,* 68 Mississippi 79; *Holland* v. *Silver Bow Commissioners,* 15 Montana 460.

The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the

debt secured by the mortgage; and, with equal distinctness, provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest legal or equitable, may be taxed to its owner (whether resident or non-resident) in the State where the land is situated, without contravening any provision of the Constitution of the United States.

Decree affirmed.

Mr. Justice HARLAN and Mr. Justice WHITE dissented.

Mr. Justice McKENNA, not having been a member of the court when this case was argued, took no part in the decision.

NEW ORLEANS V. STEMPEL.

Supreme Court of the United States. October, 1899.
175 United States 309.

This case came on appeal from the Circuit Court of the United States for the Eastern District of Louisiana. It is a suit brought by the appellee to restrain the collection of taxes levied upon certain personal property which she claims was exempt from taxation. The important facts are these: The plaintiff, as well as the infants whose guardian she is, and for whose benefit she brings this suit, are residents of the State of New York, in which State she has been duly appointed the guardian of their estates. The infants inherited certain property from their grandfather, a resident of Louisiana, whose estate was duly settled in the proper court of that State. By regular proceedings these infants had been adjudged his legal heirs, and she, as guardian, had been put in possession of their property thus inherited. The order of the court, in this respect, was rendered February 14, 1896, and the taxes which were sought to be restrained were those of that year. The assessment, as appears by the assessment roll, was in the name of "the estate of D. C. McCan;" was of $15,000, "money in possession, on deposit, or in hand," and of $800,000, "money loaned on interest, all credits and all bills receivable, for money loaned or advanced, or for goods sold; and all credits of any and every description." The principal contentions of

the plaintiff were: First, that included within this personal property was some $228,000 of the bonds of the State of Louisiana, taxation of which by the State or any of its municipalities was void, as impairing the obligation of a contract made by the State. Second, that the situs of the loans and credits was in New York, the place of residence of the guardian and wards, and, therefore, being loans and credits without the State of Louisiana they were not subject to taxation therein.

Mr. Justice BREWER, after making the above statement, delivered the opinion of the court.

. . . .

The important question is whether the property was subject to taxation. With regard to the contention that certain bonds were included in the assessment which were not subject to taxation on account of the supposed contract of the State of Louisiana, it is sufficient to say that the assessment does not purport to include any bonds.

. . . .

Under the circumstances disclosed by the testimony, were the money and credits subject to taxation? It appears that these credits were evidenced by notes largely secured by mortgages on real estate in New Orleans; that these notes and mortgages were in the city of New Orleans, in possession of an agent of the plaintiff, who collected the interest and principal as it became due and deposited the same in a bank in New Orleans to the credit of the plaintiff. The question, therefore, is distinctly presented, whether, because the owners were domiciled in the State of New York, the moneys so deposited in a bank within the limits of the State of Louisiana, and the notes secured by mortgages situated and held as above described, were free from taxation in the latter State. Of course, there must be statutory warrant for such taxation, for if the legislature omits any property from the list of taxables the courts are not authorized to correct the omissions and adjudge the omitted property to be subject to taxation.

. . . .

From this review of the decisions of the Supreme Court of the State it is obvious that moneys, such as those referred to, collected as principal and interest of notes, mortgages and other securities kept within the State and deposited in one of the banks of the State for use or reinvestment, are taxable under the act of 1890.

. . . .

When the question is whether property is exempt from taxation,

and that exemption depends alone on the true construction of a statute of the State, the Federal courts should be slow to declare an exemption in advance of any decision by the courts of the State. The rule in such a case is that the Federal courts follow the construction placed upon the statute by the state courts, and in advance of such construction they should not declare property beyond the scope of the statute and exempt from taxation unless it is clear that such is the fact. In other words, they should not release any property within the State from its liability to state taxation unless it is obvious that the statutes of the State warrant such exemption, or unless the mandates of the Federal Constitution compel it.

If we look to the decisions of the other States we find the frequent ruling that when an indebtedness has taken a concrete form and become evidenced by note, bill, mortgage or other written instrument, and that written instrument evidencing the indebtedness is left within the State in the hands of an agent of the non-resident owner, to be by him used for the purposes of collection and deposit or reinvestment within the State, its taxable situs is in the State. See *Catlin* v. *Hull,* 21 Vermont 152, in which the rule was thus announced (pages 159, 161):

. . . .

With reference to the decisions of this court it may be said that there has never been any denial of the power of a State to tax securities situated as these are, while there have been frequent recognitions of its power to separate for purposes of taxation the situs of personal property from the domicil of the owner.

. . . .

This matter of situs may be regarded in another aspect. In the absence of statute, bills and notes are treated as choses in action and are not subject to levy and sale on execution, but by the statutes of many States, they are made so subject to seizure and sale, as any tangible personal property. I Freeman on Executions, sec. 112; 4 Am. & Eng. E. of L., 2d ed. 282; 11 Am. & Eng. E. of L., 2d ed. 623. Among the States referred to in these authorities as having statutes warranting such levy and sale are California, Indiana, Kentucky, New York, Tennessee, Iowa, and Louisiana. . . . . .

Now if property can have such a situs within the State as to be subject to seizure and sale on execution, it would seem to follow that the State has power to establish a like situs within the State for the purpose of taxation. . . . . .

It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where

found, irrespective of the domicil of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation.

It follows from these considerations that

The decree of the Circuit Court must be reversed and the case remanded for further proceedings.

Mr. Justice HARLAN and Mr. Justice WHITE dissented.

KIRTLAND V. HOTCHKISS.

Supreme Court of the United States. October, 1879.
100 United States 491

Charles W. Kirtland, a citizen of Connecticut, instituted this action for the purpose of restraining the enforcement of certain tax-warrants levied upon his real estate in the town in which he resided, in satisfaction of certain State taxes, assessed against him for the years 1869 and 1870. The assessment was by reason of his ownership, during those years, of certain bonds, executed in Chicago, and made payable to him, his executors, administrators, or assigns in that city, at such place as he or they should by writing appoint, and, in default of such appointment, at the Manufacturers' National Bank of Chicago. Each bond declared that "it is made under, and is, in all respects, to be construed by the laws of Illinois, and is given for an actual loan of money, made at the city of Chicago, by the said Charles W. Kirtland to the said Edwin A. Cummins, on the day of the date hereof." They were secured by deeds of trust, executed by the obligor to one Perkins, of that city, upon real estate therein situated, the trustees having power by the terms of that deed to sell and convey the property and apply the proceeds in payment of the loan, in case of default on the part of the obligor to perform the stipulations of the bond.

The statute of Connecticut, under which the assessment was made, declares, among other things, that personal property in that State "or elsewhere" should be deemed for purposes of taxation, to include all moneys, credits, choses in action, bonds, notes, stocks (except United

States stocks), chattels or effects, or any interest thereon; and that such personal property or interest thereon, being the property of any person resident in the State, should be valued and assessed at its just and true value in the tax-list of the town where the owner resides. The statute expressly exempts from its operation money or property actually invested in the business of merchandizing or manufacturing, when located out of the State. Conn. Revision of 1866, p. 709, tit. 64, c. 1, sect. 8.

The court below held that the assessments complained of were in conformity to the State law, and that the law itself did not infringe any constitutional right of the plaintiff.

This writ of error is prosecuted by Kirtland upon the ground, among others, that the statute of Connecticut thus interpreted and sustained is repugnant to the Constitution of the United States.

Mr. Justice HARLAN, after stating the case, delivered the opinion of the court.

We will not follow the interesting argument of counsel by entering upon an extended discussion of the principles upon which the power of taxation rests under our system of constitutional government. Nor is it at all necessary that we should now attempt to state all limitations which exist upon the exercise of that power, whether they arise from the essential principles of free government or from express constitutional provisions. We restrict our remarks to a single question, the precise import of which will appear from the preceding statement of the more important facts of this case.

In *McCulloch* v. *State of Maryland,* (4 Wheat. 428), this court considered very fully the nature and extent of the original right of taxation which remained with the States after the adoption of the Federal Constitution. It was there said "that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it." Tracing the right of taxation to the source from which it was derived, the court further said: "It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation."

"This vital power," said this court in *Providence Bank* v. *Billings,* (4 Pet. 563), "may be abused; but the Constitution of the United States was not intended to furnish the corrective for every

abuse of power which may be committed by the State governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation."

In *St. Louis* v. *The Ferry Company,* (11 Wall. 423), and in *State Tax on Foreign-held Bonds,* (15 id. 300), the language of the court was equally emphatic.

In the last named case we said that "unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

We perceive no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relations which, under the Constitution, exist between the United States and the several States. Upon their strict observance depends, in no small degree, the harmonious and successful working of our complex system of government, Federal and State. It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive, or onerous.

Plainly, therefore, our only duty is to inquire whether the Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond,

wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in *State Tax on Foreign-held Bonds (supra),* the right of the creditor "to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, ... has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein," &c. Cooley on Taxation, 15, 63, 134, 270. The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the Federal government, for the reason, too obvious to require argument for its support, that such taxation violates no provision of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exercise by Congress of the power to regulate commerce among the several States. *Nathan* v. *Louisiana,* 8 How. 73; Cooley on Taxation, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizens of life, liberty or property without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal government cannot rightly interfere.

Judgment affirmed.

MILLER V. PENNSYLVANIA.

Supreme Court of Pennsylvania. November, 1885.
111 Pennsylvania State 321.

Mr. Justice GREEN delivered the opinion of the court, January 4th, 1886.

The third clause of the will of David Richey is undoubtedly a positive and peremptory order to his executors to sell all of the real estate in question in this case. All of the numerous legacies which are given by the following clauses of the will are payable in money out of the proceeds of the property sold under the direction contained in the third clause. Under all the decisions it cannot be questioned that the third clause of the will operated a conversion of the residuary real estate into personalty efficacious from the moment of the testator's death. . . . . .

. . . .

Had there been a mere discretion to sell, as was the case in *Drayton's Appeal,* 11 P. F. S. 172, we should have felt bound to hold there was no conversion, and that as the land was situated in another State it would not be subject to collateral inheritance tax, as was decided in *Commonwealth* v. *Coleman,* 2 P. F. S. 468. But as the order to sell was absolute, and worked a conversion which was not affected by a permission to convey parts of the land in satisfaction of legacies, we have no choice to regard it other than personalty. As such, it must be regarded as passing by the law of the domicile, and hence subject to the tax. . . . . .

We cannot regard as of any efficacy the contention that conversion is to be considered only for the specific purpose of paying legacies, and that for all other purposes the real estate must be treated as such.

It is the legacies themselves that are subject to the tax. As these legacies pass to the legatees only in the form of money, we cannot regard them as other than personalty. If any of the real estate should be conveyed to legatees in satisfaction of their legacies, it would only be as a substituted equivalent for the pecuniary sum of the legacies.

Judgment affirmed.

HANDLEY'S ESTATE.

Supreme Court of Pennsylvania. February, 1897.
181 Pennsylvania State 339.

Opinion by Mr. Justice MITCHELL.

The first and most important question in this case is the liability of testator's lands in Virginia to assessment for collateral inheritance tax. The effort of a state to impose a tax which must in effect come out of land beyond its boundaries, however indirect or ingenious the mode of exaction, has always been a matter of very questionable jurisdiction. It is universally conceded that the tax cannot be laid directly, and nowhere is this rule stated more positively than in our own cases. See *Bittinger's Estate,* 129 Pa. 338; *Com.* v. *Coleman's Admr.,* 52 Pa. 468; *Drayton's Appeal,* 61 Pa. 172. And the collateral inheritance tax, being a tax on the property passing from the decedent, and not a mere succession duty imposed on the recipient (*Bittinger's Est., supra*), is within the defect of power to impose it on land outside of the state.

The border line however is reached when property which is in fact real estate is to be treated as personalty under the doctrine of equitable conversion. On this subject two different views have been entertained by different courts. In *Custance* v. *Bradshaw,* 4 Hare 315, land was held by a partnership, and the interest of one partner who had died was sold to another partner. It was claimed that this interest was personalty and liable to probate duty. But Vice Chancellor Wigram held that conversion being an equitable fiction would only be carried to the extent necessary to accomplish the equitable result aimed at, and "would not alter the nature of the property for the purpose only of subjecting it to fiscal claims to which at law it was not liable in its existing state." More recent English cases have somewhat modified this decision so far as relates to land held by partners for partnership purposes. See Dos Passos on Inheritance Tax Law, Sec. 46b, and 32 Am. Law Reg. N. S. 474, note by Mr. Howard W. Page. But the Court of Appeals of New York adopted the same view as late as 1893. *Matter of Swift's Estate,* 137 N. Y. 77; and *Matter of Curtis' Est.,* 142 N. Y. 219, where it is said, "it was never intended by the law to tax a theory having no real substance behind it," and quoting *Swift's Est., supra,* "the question of taxation is one of fact, and cannot turn on theories or fiction."

In Pennsylvania, however, the other view was taken in *Miller* v.

Com., 111 Pa. 321, where it was held that, as the testator had peremptorily directed a sale of the land and a distribution of the proceeds, the doctrine of conversion applied, and the actual situs of the land was immaterial, as what passed under the will was not the land but the proceeds, which were personalty and liable to the tax. The same rule was followed in *Williamson's Est.,* 153 Pa. 508. These cases rest on the basis that the testator intended and directed not a merely nominal or limited conversion but an actual conversion by sale, and the blending of the proceeds with his other personalty for purposes of administration under his will. The action of the court in dating such conversion from the instant of death was but the application of the general rule that what is to be done is to be treated in equity as done already. Though this argument is severely technical, and therefore questionable in regard to jurisdiction to tax land in fact situated in another state, yet it has the merit of being unanswerably logical if the premise be once accepted. This court has followed the argument unswervingly to its logical conclusion, even when the result seemed contrary to the express legislative policy of the state. Thus in *Coleman's Est.,* 159 Pa. 231, where land in Pennsylvania was owned by a testator in New York whose will made an equitable conversion, the logical corollary of *Miller* v. *Com.* was accepted and the land was held to have become personalty and to follow the owner's domicile, and therefore not to be taxable here.

All our cases agree that the status of the property at the instant of death must govern the question of tax, both as to liability and amount. *Drayton's App.* 61 Pa. 172; *Mellon's App.* 114 Pa. 564; *Williamson's Est.,* 153 Pa. 508, 521. Where, therefore, the conversion is not imperative, but only permissive and rests in the discretion of the executors or others, it does not become operative until the exercise of the discretion, and in the meantime the land retains its normal character. *Drayton's Appeal, supra; Miller* v. *Com.,* 111 Pa. 321.

For the same reasons, where the conversion though imperative is not in presenti but in futuro, it goes into effect only from the happening of the stipulated contingency. This brings us to the exact question now before us, and we find it expressly decided in the last case on the subject. *Hale's Est.,* 161 Pa. 181. The testator left lands in Missouri to his wife for her life, and upon her death, directed his executors to sell them and invest the proceeds in mortgages in St. Louis and pay the income therefrom to collaterals. It was held by the orphan's court of Philadelphia that the proceeds

were not taxable and the decision was affirmed. The auditing judge put his conclusion directly on the postponement of the conversion, and though the court in banc referred to the additional circumstance that the proceeds were to be invested in mortgages in St. Louis, yet it is clear that that was not a material point in the *ratio decidendi.* Mortgages, no matter what the situs of the land pledged, are personal property, and if the conversion had been immediate, no direction as to the investment of the proceeds could have exempted them from the tax. The ground of the decision, which is the logical result of the principles adopted in all the preceding cases, is that the tax is assessable at the instant of death, and where the conversion is not referable to that same instant, as where it is to take place only in the discretion of the executors, or a fortiori where it is postponed by the express direction of the testator, the land in the meantime retains its real character, and being outside the state is not subject to taxation.

In the present case the testator postponed the sale for twenty years, and there was therefore no conversion when the tax upon the estate accrued. The assignments of error to the tax on the lands in Virginia and West Virginia are therefore sustained.

. . . .

The decree is reversed and the appraisement directed to be readjusted on the principles herein stated.

MATTER OF SWIFT.

Court of Appeals of New York. January, 1893.
137 New York 77.

GRAY, J. James T. Swift died in July, 1890; being a resident of this state and leaving a will, by which he made a disposition of all his property among relatives. After many legacies of money and various articles of personal property, he directed a division of his residuary estate into four portions, and he devised and bequeathed one portion to each of four persons named. The executors were given a power of sale for the purpose of paying the legacies and of making the distribution of the estate. At the time of his death, the testator's estate included certain real estate and tangible personal property in chattels, situated within the state of New Jersey, which were realized upon by the executors and converted into

moneys in hand. When, upon their application, an appraisement was had of the estate, in order to fix its value under the requirements of the law taxing gifts, legacies and inheritances, the surrogate of the county of New York, before whom the matter came, held, with respect to the appraisement, that the real and personal property situated without the state of New York were not subject to appraisal and tax under the law, and the exceptions taken by the comptroller of the city of New York to that determination raise the first and the principal question which we shall consider.

Surrogate Ransom's opinion, which is before us in the record, contains a careful review of the legal principles which limit the right to impose the tax, and his conclusions are as satisfactory to my mind, as they evidently were to the minds of the learned justices of the General Term of the Supreme Court, who agreed in affirming the surrogate's decree upon his opinion.

. . . .

The question here does not relate to the power of the state to tax its residents with respect to the ownership of property situated elsewhere. That question is not involved. The question is whether the legislature of the state, in creating this system of taxation of inheritances, or testamentary gifts, has not fixed as the standard of right the property passing by will, or by the intestate laws.

. . . .

The effect of this special tax is to take from the property a portion or percentage of it, for the use of the state, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons. If it is called a tax upon the succession to the ownership of property; still it relates to and subjects the property itself, and when that is without the jurisdiction of the state, inasmuch as the succession is not of property within the dominion of the state, succession to it cannot be said to occur by permission of the state. As to lands this is clearly the case, and rights in or power over them are derived from or through the laws of the foreign state or country. As to goods and chattels it is true; for their transmission abroad is subject to the permission of and regulated by the laws of the state or country where actually situated. Jurisdiction over them belongs to the courts of that state or country for all purposes of policy, or of administration in the interests of its citizens, or of those having enforceable rights, and their surrender, or transmission, is upon principles of comity.

When succession to the ownership of property is by the permission of the state, then the permission can relate only to property over which the state has dominion and as to which it grants the privilege or permission.

Nor is the argument available that, by the power of sale conferred upon the executors, there was an equitable conversion worked of the lands in New Jersey, as of the time of the testator's death, and, hence, that the property sought to be reached by the tax, in the eye of the law, existed as cash in this state in the executor's hands, at the moment of the testator's death. There might be some doubt whether the main proposition in the argument is quite correct and whether the land did not vest in the residuary legatees, subject to the execution of the power of sale. But it is not necessary to decide that question. Neither the doctrine of equitable conversion of lands, nor any fiction of *situs* of movables can have any bearing upon the question under advisement. The question of the jurisdiction of the state to tax is one of fact and cannot turn upon theories or fiction; which, as it has been observed, have no place in a well adjusted system of taxation.

We can arrive at no other conclusion, in my opinion, than that the tax provided for in this law is only enforceable as to property which, at the time of the owner's death, was within the territorial limits of this state As a law imposing a special tax, it is to be strictly construed against the state and a case must clearly be made out for its application. We should incline against a construction which might lead to double taxation; a result possible and probable under a different view of the law. If the property in a foreign jurisdiction was in land, or in goods and chattels, when, upon the testator's death, a new title, or ownership, attached to it, the bringing into this state of its cash proceeds, subsequently, no matter by what authority of will, or of statute, did not subject it to the tax. A different view would be against every sound consideration of what constitutes the basis for such taxation, and would not accord with an understanding of the intention of the legislature, as more or less plainly expressed in these acts.

. . . .

My brethren are of the opinion that the tax imposed under the act is a tax on the right of succession, under a will, or by devolution in case of intestacy; a view of the law which my consideration of the question precludes my assenting to.

They concur in my opinion so far as it relates to the imposition of a tax upon real estate situated out of this state, although owned

by a decedent, residing here at the time of his decease; holding with me that taxation of such was not intended, and that the doctrine of equitable conversion is not applicable to subject it to taxation. But as to the personal property of a resident decedent, wheresoever situated, whether within or without the state, they are of the opinion that it is subject to the tax imposed by the act.

The judgment below, therefore, should be so modified as to exclude from its operation the personal property in New Jersey and, as so modified, it should be affirmed, without costs to either party as against the other.

Maynard, J., not sitting.

MARYLAND V. DALRYMPLE ET AL.

Court of Appeals of Maryland. January, 1889.
70 Maryland 294.

McSherry, J., delivered the opinion of the court.

William H. Dalrymple, a resident of California, died there on the twenty-second of November, eighteen hundred and eighty-one, leaving a last will and testament executed according to the laws of that State. By his will he bequeathed all his personal property to one Marie E. Hatch, now Marie E. Gamble, also of California. She was not the mother, the wife, the child nor lineal descendant of the testator. The will was duly admitted to probate in the Probate Court of the decedent's domicile, and letters of administration were there granted with the will annexed to Peter Alferitz. Subsequently a certified transcript of said will and probate was admitted by the Register of Wills of said Baltimore City to record and was recorded in his office. Thereafter letters of administration with the will annexed, were issued by the Orphans' Court of Baltimore City to the appellees. When William H. Dalrymple died he was entitled to a one-fourth undivided part of the personal estate of his brother, Edwin A. Dalrymple, a resident of the State of Maryland, who died in the City of Baltimore in October, eighteen hundred and eighty-one, some three weeks prior to the decease of William. Upon the settlement of Edwin's estate the appellees received, as administrators of William's estate, sundry certificates of National Bank stock and Baltimore City stock, several Missouri State bonds and cash, aggregating at the appraised value of the securities, the sum

of $27,337.87; which was diminished by the payment of costs and expenses to the sum of $21,449.21; but the accretions from dividend and interest have since increased this latter amount to the sum of $27,320.77; which the appellees now hold ready for delivery to the said Mrs. Gamble, the legatee named in William's will. Upon this sum the State of Maryland claims that the appellees owe to the State the collateral inheritance tax of two and one-half per cent, imposed by *sec.* 102, of *Art.* 81 of the Code of 1888. Suit was brought by the State against the appellees for the recovery of this tax. To the declaration, which sets forth in detail the facts we have just outlined, the appellees demurred, and the Court of Common Pleas of Baltimore sustained the demurrer, and entered judgment thereon against the State. From that judgment this appeal has been taken.

The statute imposing this tax is in these words: "All estates, real, personal, and mixed, money, public and private securities for money of every kind passing from any person who may die seized and possessed thereof, being in this State, ... to any person or persons, bodies politic or corporate, in trust or otherwise, other than to or for the use of the father, mother, husband, wife, children and lineal descendants of the grantor . . . . . shall be subject to a tax of two and a half per centum on every hundred dollars of the clear value of such estate, money or securities . . ."

It has been settled by this court in *Tyson et al.* v. *State,* 28 Md., 577, that such a tax is free from any constitutional objection.

. . . .

Possessing, then, the plenary power indicated, it necessarily follows that the State in allowing property actually located here, or personal property situated elsewhere but owned by a resident, to be disposed of by will, and in designating who shall take such property, where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the Legislature may deem expedient. These conditions, subject to the limitation named, are, consequently wholly within the discretion of the General Assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and a half per cent. into the treasury of the State. This, therefore, is not a tax upon the property itself,

but is merely the price exacted by the State for the privilege accorded in permitting property so situated, to be transmitted by will or by descent or distribution.

That this is so is abundantly clear from the language of the statute and its several provisions.

. . . .

It is thus quite apparent that the whole scheme of the law looks to and contemplates the collection of the tax through an executor or administrator exercising authority under the laws of this State, and answerable to those laws for the faithful performance of his duties. Ample provision is made for every possible contingency that may arise, whether the decedent be a resident of this State or not, provided the property be located here, if he be a non-resident, or be actually or constructively here, if he be a resident. No estate can escape administration if the laws be enforced, and when the property passes into the hands of the executor or administrator his obligation to pay the tax is fixed and his bond at once becomes liable therefor.

The tax, we have said, is on the *transmission* of the property "being in the State," and no reason has been assigned or can be suggested why the broad language of the statute and the evident design of the Legislature should be so narrowed and restricted as to exempt from this tax the property of a non-resident actually here, notwithstanding that same property may, for other purposes, be treated as constructively elsewhere.

. . . .

In permitting property within the State, upon the death of its owner, to pass by devise or descent or distribution, the Legislature has seen fit, where strangers or collateral kindred receive it, to exact, as the condition upon which that privilege is granted, the tax in question. The imposition and collection of the tax cannot, therefore, depend upon the mere accidental residence of the owner.

. . . .

Orcutt's Appeal, 97 Pa. St. 179, is not analagous to the case before us. There a resident of New Jersey had deposited with a Philadelphia trust company, for safe keeping, certain United States bonds. He died in New Jersey, where administration upon his estate was duly granted. The trust company declined to surrender these bonds to the New Jersey executor unless ancillary letters should be taken out in Pennsylvania. These letters were accordingly taken out, the bonds were received from the trust company, and being over-due, were collected; and thereupon the collateral in-

heritance tax was demanded and the Orphan's Court of Philadelphia directed it to be paid. This order was reversed upon appeal. It is obvious the bonds had no *situs* different from the domicile of their owner. They were "simply evidences of indebtedness, not by any person or corporation within the Commonwealth, but by the general government. . . . The testator intrusted the bonds temporarily, for safe keeping, to the Fidelity Company, but they were constructively at least, in his possession at the time of his decease." In the case at bar the property is actually in this State. It belonged to Edwin A. Dalrymple, who was, at the time of his death, a resident of Maryland. Upon his decease his brother William became entitled to it. It is still here in Maryland and the larger portion of it is invested in the very same stocks and securities which Edwin held in his lifetime.

We have no difficulty in distinguishing between this and the English cases. In those cases the several Acts of Parliament imposing probate, legacy and succession duties underwent construction.

. . . .

Thus whilst the power of Parliament to impose the tax without reference at all to the subject of domicile is distinctly recognized; it was held that the language of the Acts did not furnish any indication of an intention to exercise that power, and that, therefore, the law of the domicile of the owner fixed the liability of his property to pay these taxes. In our opinion, for the reasons we have given, the Maryland statute cannot be so construed.

It results from what we have said, that the tax is payable in this case, and the amount of the tax will depend upon the sum in the hands of the appellees payable to the legatee.

The judgment of the Court of Common Pleas, must, therefore, be reversed, and a new trial will be awarded.

Judgment reversed and new trial awarded.

See also cases reported in Chap. X under IV *Situs of property*.

CHAPTER VI.

EQUALITY AND UNIFORMITY IN TAXATION.

I. Individual Discrimination.

STATE *EX REL.* TRUSTEES V. TOWNSHIP COMMITTEE.

Supreme Court of New Jersey. November, 1872
7 Vroom 66.

Depue, J. Application being made by the school trustees to the township committee for the issuing of bonds to the amount of $3500, under the act above recited, the township committee declined to issue the same, whereupon application was made to this court for a writ of mandamus to compel the committee to issue such bonds.

The amount of tax assessed in the school district for the building of a school-house in the year 1871 was $1000. Of this amount it appears by the depositions that $807 have been collected. The residue is in litigation. The act directs that the first assessment upon the persons and property in the school district liable to taxation to provide the means of paying the bonds, shall not exceed $2000, and that in assessing the sum the township committee shall so direct to be raised the amount in excess of $1000 that it shall be assessed only on those taxable inhabitants of the school district who have not paid the assessment against them for the year 1871. Under this section the township committee are empowered to direct the assessment of the sum of $1000 upon certain individuals who are delinquents, whose delinquency in all is less than $200. It is insisted by the defendants' counsel that the mode of levying the tax contemplated by this act is not a legitimate method of taxation, and that therefore no adequate provision is made for the payment of the bonds of the township by taxation upon the school district.

The power of the legislature to validate the assessment of taxes which is liable to be avoided for mere irregularities in the proceedings in making the assessment, is well settled. *State* v. *Apgar,* 2 Vroom 358; *State* v. *Town of Union,* 4 Ib. 350. The act in question has none of the qualities of an act validating the proceedings in levying the former tax. It is the assumption by the legislature of the power to subject the delinquents to a penalty of $1,000 for a delinquency of $200, in the discretion of the township committee.

That this is the real import of the act is apparent. Indeed, the learned and astute counsel who argued this motion in behalf of the relators, so clearly discerned the exact import of this legislation that he was driven to maintain before the court that it was within the power of the legislature to select certain individuals as subjects of taxation, and impose upon them individually such burdens as the legislature saw fit, even to the extent of the payment of the state debt, or defraying the entire expenses of the state government.

The power of the legislature in the matter of taxation is said to be unlimited. Such undoubtedly is the theory of our government. But it is not every exaction made under color of taxation that can be supported as the legitimate exercise of the sovereign power of taxation. It is of the very essence of taxation that it should be equal and uniform, and that where the burden is common there should be a common contribution to discharge it. *Cooley's Const. Law* 495. Not that it is essential to the validity of taxation that it should be levied according to rules of abstract justice. The legislature may create special taxing districts, defining their limits in its discretion, or designate certain occupations, trades or employments as special subjects for taxation; or discriminate between different kinds of property in the rate of taxation; or may apportion the taxes among the classes of persons or property made liable to taxation, in such manner as may seem fit. In this way inequalities in the share of the public burden, or even double taxation may arise without any relief except by appeal to the legislature. But when the taxing district has been defined, and the classes of persons or kind of property specially set apart for taxation have been designated, the tax must be apportioned among those who are to bear the burden upon the rule of uniformity. *Cooley's Const. Law,* pp. 493-513. Taxation operates upon a community, or a class in a community, according to some rule of apportionment. When the amount levied upon individuals is determined without regard to the amount or value exacted from any other individual or classes of individuals, the power exercised is not that of taxation but of eminent domain. *The People* v. *Mayor of Brooklyn,* 4 Comstock 420. A tax upon the persons or property of A, B and C individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons or property of the class of persons or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use without compensation. The process is one of confiscation and not of taxation.

But it is argued that the township Committee may, in executing their duties under the act, so perform them as that no greater sum will be levied upon the delinquents, or their property, than the amount of their unpaid tax, and that therefore a valid tax may be laid under the act. The argument may be sound. On that subject the court express no opinion. For the present purposes it is sufficient that the act in question gives to the township committee the power arbitrarily to impose a sum in excess of such delinquency. Nor does it appear except by the recital in the preamble of the act, that the refusal of the delinquents to pay the former assessment is based on mere irregularities in the mode of assessment. For aught that is shown, the legal objections to the collection of the tax assessed against them, are of such nature as to be beyond the power of the legislature to remove.

The school district in question is one of the school districts in the township of Readington. The act does not impose upon the township the burden of erecting the school building. It contemplates that the cost shall ultimately be borne by the taxable inhabitants of the district, although the only means of reimbursement is by the taxation provided for.

The court should not award a mandamus to enforce this compulsory suretyship by the township for the debts of the school district, where any well grounded doubt exists whether the means of indemnification provided are such as can be made available. It is better to subject the school district to the inconvenience of a delay until further legislative action may be obtained, than to involve the township in a litigation to enforce the collection of a tax of doubtful constitutionality.

The application is denied, and rule to show cause discharged.

GILMAN V. CITY OF SHEBOYGAN.

Supreme Court of the United States. December, 1862.
2 Black, 510.

Mr. Justice SWAYNE. This is a suit in equity brought here by appeal from the District Court of the United States for the District of Wisconsin. The bill states as follows:

The complainant is the owner of a large amount of real estate in the city of Sheboygan, which is described in the bill.

. . . .

[Under acts of the legislature] the City has made loans and issued its bonds therefor to the amount of $200,000.

The legislature passed a subsequent Act which is as follows:

"Section 1. All taxes hereafter levied by the common council of the city of Sheboygan for the [payment] of principal or interest of any bonds issued or to be issued by said City to aid in the construction of any railroad, plank road, or for any improvement of the harbor at the mouth of the Sheboygan River, shall be levied by said council on the real estate of said city exclusively.

"Sec. 2. All acts or parts of acts that conflict with the provisions of this act are hereby repealed.

"Sec. 3. This act shall take effect and be in force from and after its passage.

"Approved March 7, 1857."

In the year 1857, the City Council under the last named act, levied a tax upon all real estate within the limits of the City of six cents upon each dollar of the valuation thereof "for its harbor loans, railroad and plank road bonds," "and did not levy said sum or any part thereof upon any other kind of property within the said City of Sheboygan for the said harbor loans, railroad and plank road bonds, but levied the tax for the payment of the interest upon those specific objects entirely and solely out of the real estate within said City limits; and that the real estate above stated and set forth in this complaint was included in and was taxed at the rate aforesaid, and for the purpose aforesaid."

At the time this tax was levied, there was personal property in the City of Sheboygan to the amount of three or four hundred thousand dollars, liable to taxation, and upon which no tax was levied for either of said purposes for the year 1857. The act of March 7, 1857, and the tax levied under it, are alleged to be void. Defendant, Geele, is the treasurer of said City, and as such authorized to execute deeds for land sold for taxes when the time for redemption expires. The complainant's property in the City has been sold for said tax and bought in by the City. Geele threatens to execute deeds to the City for the same. The time for redemption is about to expire.

The deeds, it is alleged, will cast a cloud upon complainant's title, embarrass him in disposing of the property, and render it less valuable to him. The prayer of the bill is that the treasurer be perpetually enjoined from executing, and the City from receiving, such deeds, and for general relief. . . . . .

. . . .

Is the Act of 1857 invalid, because it requires the tax in question to be levied exclusively upon the real estate of the city?

The provisions of the State Constitution, to which our attention has been called, as bearing upon the subject, are the following:

Art. VIII. "Sec. 1.—The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe."

. . . .

In *Knowlton* v. *The Supervisors of Rock County,* (9 Wis. Rep. 410), the section requiring uniformity of taxation underwent an able and exhaustive examination. The Court affirmed the following propositions:

"The levying of taxes by the authorities of a county, city or town, for their support is as much the exercise of the taxing power as when directly by the State for its support. The State acts by the municipal governments, and their acts in levying taxes are as much the act of the State as if the State acted by its own officers.

"The Constitution of the State requires, as a rule in levying taxes, that the valuation must be uniform and in all cases alike or equal, operating alike upon all the taxable property throughout the territorial limits of the State or municipality within which the tax is to be raised. And where the Legislature prescribed a different rule, the act is a departure from the constitution and therefore void.

"The Constitution has fixed one unbending uniform rule of taxation for the State, and property cannot be classified and taxed as classed by different rules.

"The provision of the Constitution, that taxes shall be levied upon such property as the Legislature shall prescribe, does not sanction a discrimination which provides for taxing a particular kind of property for the support of Government by a different rule from that by which other property is taxed; for when the kind of property is prescribed the rule of taxation must be uniform. All kinds of property must be taxed uniformly, or be absolutely exempt."

In this case, under the provisions of the charter of the City of Janesville, lands within the City limits laid out into City lots, and other lands not so laid out, had been taxed at different rates, and the property of plaintiff had been sold for the non-payment of the taxes. The Court held the tax void, and enjoined the treasurer from executing deeds to the tax purchasers.

In the case of *Weeks* v. *The City of Milwaukee et al.,* (10 Wis. 242), the preceding case was considered and approved by the Court. The proposition that the constitutional provision requiring the "rule

of taxation to be uniform" extends to municipal corporations, and that the constitutional provision requiring the Legislature to restrict their powers of taxation was only intended to furnish a further protection, were expressly and unanimously re-affirmed. They held further, that where the assessors of the City of Milwaukee, in obedience to an ordinance of that City, omitted to assess property to the value of $150,000, which ought to have been assessed, and that property was thereby exempted from taxation, the omission was fatal to the entire tax, and that the complainant's taxes being increased by the omission he was entitled to an injunction to restrain the sale of his lands for such illegal taxes.

In *Sanderson* v. *Cross,* (10 Wis. 282), the doctrines of *Knowlton* v. *The Supervisors of Rock County,* were again unanimously approved.

In their opinion the court adopt the following language, from the *City of Zanesville* v. *Richards,* (5 Ohio St. 589): "The General Assembly is no longer invested with the discretion to apportion the tax, and to determine upon what property and in what proportion the burden shall be laid. A uniform rate per cent must be levied upon all property subject to taxation according to its true valuation money, so that all may bear an equal burden."

The Ohio case was decided under provisions in the Constitution of that State similar to those in the Constitution of Wisconsin, to which we have referred.

In the *Attorney General* v. *The Winnebago Lake and Fox River Plank Road Company,* (11 Wis. 42), the Court say: "It cannot be denied that under the power of exemption unjust enactments in respect of the power of taxation might be made. But those who framed the Constitution did not see fit to prevent such evils by depriving the Legislature of the power. But they did provide that whatever property was made taxable *at all* should be taxed by a uniform rule, which was designed to secure equality in the burdens as between the different kinds of taxable property, but of course not as between property taxable and that not taxable."

The Court refer with approbation to the *Exchange Bank of Columbus* v. *Hines,* (3 Ohio St. 1.) In that case the Supreme Court of Ohio say: "Taxing is required to be by a '*uniform rule,*' that is, by one and the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the *rate* of taxation, but also uniformity in the mode of assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the

mode of assessment, as well as the rate of taxation. But this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must extend to *all property* subject to taxation, so that all property may be taxed alike,—equally—which *is* taxing by a uniform rule."

. . . .

Acting upon a principle, recognized in its administration from the earliest period of its history, this Court considers itself bound in cases like this to follow the settled adjudications of the highest State Court, giving constructions to the Constitution and laws of the State. . . . . .

The bill avers that at the time the tax complained of was levied, there was personal property in the city, of the value of from $300,-000 to $400,000, liable to taxation. The demurrer admits this fact. The statute prescribing the property to be taxed, and that to be wholly exempted from taxation, shows that this personal property must have been taxed for other purposes. This tax was levied exclusively upon the real estate of the City. That was a discrimination in favor of the personal property. It was beyond the constitutional power of the Legislature to make any discrimination. Property must be wholly exempted or not exempted at all. No partial exemption or discrimination is permitted. To impose certain taxes exclusively upon one class of taxable property is as much a discrimination as to vary the rates of the same or other taxes upon different classes of property.

The latter was attempted to be done, as has been shown, in the city of Janesville. The tax was adjudged to be utterly void.

The same result must follow here.

A case illustrating more strongly than the case before us, the wisdom of the rule of the Constitution, as thus interpreted, and the injustice which may be done in departing from it, can hardly be imagined.

The Court below erred in sustaining the demurrer and dismissing the bill.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

MATTER OF PELL.

Court of Appeals of New York. 1902.
171 New York, 48.

BARTLETT, J. The testator, Walden Pell, 1st, died, in the city of New York on the fourteenth day of April, 1863, and by the terms of his will he gave a life estate in all his property to his widow, with remainders over at her death in equal shares (after making various bequests of personal property) to his nephews and nieces and the issue of any deceased nephew or niece, together with one equal share thereof to his sister Emma. The life tenant, the widow, died on the twentieth day of December, 1899, at which time all the estates in remainder came into the actual possession and enjoyment of the beneficiaries under the will and codicil.

It is not disputed that under this will the bequests of personal property and the estates upon remainder of real estate vested in the beneficiaries at the time of the testator's death.

Notwithstanding the vesting of these estates in the year 1863, it is contended on behalf of the comptroller of the city of New York that they are subject to the payment of the transfer tax, under an amendment of the general statute, providing for taxable transfers (Laws 1899, ch. 76), being article ten of an act in relation to taxation, constituting chapter twenty-four of the general laws (Chap. 908 of the Laws of 1896, pp. 795, 868), which reads as follows:

"All estates upon remainder or reversion, which vested prior to June thirtieth, 1885, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof."

This amendment of 1899 became a law on March 14th of that year, the life tenant dying in the following December.

It is conceded that the remainders in this case are controlled by this amendment if it can be sustained as a valid exercise of legislative power.

. . . .

This court in *Matter of Seaman* (147 N. Y. 69) held that the Taxable Transfer Act of 1892, which provided that "such tax shall also be imposed when any person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income

thereof by any such transfer, whether made before or after the passage of this act," was to be restricted to the case of grants or gifts *causa mortis,* mentioned in the preceding portion of the subdivision, and did not extend to transfers by will or intestacy so as to subject to taxation rights of succession which accrued before the statute came into existence.

. . . .

This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It, therefore follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation.

The learned Appellate Division reached the conclusion that this amendment of 1899 was unconstitutional, and we agree with them in that regard. They have, however, sustained this legislation on the ground that it is a direct tax upon property and a legitimate exercise of the taxing power. In so holding that learned court uses this language: "It may seem incongruous that a transfer tax act, which in principle was intended to impose a tax upon the right of succession, should be construed in such a way as to uphold the tax as one upon property. Our conclusion, therefore, upon the whole case is, that if the tax sought to be imposed could only be supported upon the principle that it is a tax upon the right of succession, then there would be objections, among them constitutional ones, to its validity; but that with reference to the estate here involved, if the act can be construed, as with some misgivings we think it can, as a tax upon property, it is free from constitutional objections, and the tax may be upheld."

We are of opinion that it is a violent presumption as to the intention of the legislature to construe an act, which is avowedly de-

signed to tax the succession of property, on the death of its owner, as a direct tax.

It would seem to be too clear for argument that the legislative intention in this regard was to deal with the act relating to taxable transfers and nothing else.

. . . .

To say that the act was not an amendment of the law relating to taxable transfers of property is to contradict what plainly appears upon its face.

. . . .

The intention of the legislature being so absolutely clear in the premises, for it must be remembered that ever since the death of the testator this property has borne and discharged its annual taxes just the same as other property, we might well be justified in declining to further consider the question of whether this is an effort to impose a direct tax upon property.

Assuming, however, that the legislature intended to exercise its power of direct taxation, the learned counsel for the appellant insists that it is invalid for two reasons:

(1) The law does not subject to the tax a class of property but does subject certain designated persons, defined by the character of their ownership, to the payment of the tax.

(2) The law does not apportion the burden equally upon all the owners designated, but discriminates between different owners, so that the share of the burden imposed as to some owners is five per cent, as to other owners it is one per cent, and as to still other owners it is nothing at all.

It is the undoubted rule that the legislature possesses unlimited power of taxation except as restrained by constitutional provisions. These restraints require the taxation to be imposed according to well-settled general rules.

. . . .

It is to be observed that the amendment of 1899, now under consideration, was further amended in 1900 and 1901 by changing the words, "June 30th, 1885," to "May 1st, 1892." While these changes do not affect the case at bar, still they indicate the legislative intention to narrow the application of this statute to a very limited number of individuals belonging to a larger class. The vice of this legislation is that it does not seek to impose a tax on all estates upon remainder, whether created by will or deed, that vested prior to June 30th, 1885, but contains the further provision that

the life estate must expire after the passage of the amendment on March 14th, 1899.

All the vested estates upon remainder or reversion, as to which the intermediate life estate terminated between June 30th, 1885, and March 14th, 1899, escape taxation, as they are not within the purview of the amendment of the latter year. The tax is, therefore, imposed upon a limited class of remaindermen, while others who have come into possession and enjoyment, by reason of the termination of the life estate long after the early date fixed of June 30th, 1885, are not taxed.

The learned counsel for appellant states a very apt illustration in his brief, as follows: "We often hear it declared that the legislature may designate watches and carriages as a class of property and subject the same to the payment of duties or taxes, but would any one claim that a law, declaring that all watches or carriages which were purchased prior to June 30th, 1885, should be appraised and taxed, could be sustained upon the ground that such law merely designated a class of property for taxation?"

Where the statute declares that the owners of a particular class of property, acquired at a particular time, shall be taxed, it is equivalent to naming the owners of such property; it is in no sense a general classification.

. . . .

This amendment is clearly unconstitutional in another aspect, as it does not apportion the burden equally among the owners of estates sought to be taxed, for it imposes on some five per cent, on others one per cent, and as to other owners nothing at all. It is true this discrimination was brought about because the legislature was dealing with a succession tax, and, consequently, maintained the differing rates of taxation found in the act in relation to taxable transfers. This is still further evidence that the intention of the legislature was not to exercise its power of direct taxation.

It follows that the amendment of 1899, whether regarded as a part of the act relating to taxable transfers, or an attempt on the part of the legislature to exercise its general power of taxation, is unconstitutional and void.

The order appealed from should be reversed, with costs, and an order duly entered declaring the estate of Walden Pell, 1st, to be exempt from the transfer tax.

GRAY, O'BRIEN, CULLEN and WERNER, JJ., concur; PARKER, Ch.J., concurs only on the ground that chapter 76, Laws of 1899,

does not provide for a direct tax upon property and in so far as it aims to tax transfers of estates already vested when the act was passed (which is this case), it is void.

Order reversed, etc.

It had been held prior to the amendment of 1899 that the transfer in the case of a remainderman took place at the time of the death of the decedent. Matter of Harbeck, 161 N. Y. 211.

See for the rule applied to the exercise of a power of appointment, Orr v. Gilman, 183 U. S. 278, *supra.*

SUPERVISORS V. C., B. & Q. R. R. CO.

Supreme Court of Illinois. April, 1867.
44 Illinois 229.

Mr. Justice Breese delivered the opinion of the Court.

. . . .

The power of the legislature to impose taxes is expressly granted by the Constitution, and is found in the following provisions of that instrument. They are just, wise and simple. Section 2, article 9, requires the general assembly to provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise. Section 5 of the same article provides, that the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

In the exercise of this grant of powers, several laws have been passed by the general assembly. . . . . .

By the act of February 14, 1855, a discrimination is made in regard to the property of railroad companies. They are required, by section 4, of that act, to set forth in their schedules, or lists of taxable property, a description of all the real property owned or occupied by the company in each county, town and city through which their railroad may run, and the actual value of each lot or parcel of land, including the improvements thereon (except the track or superstructure of the road), must be annexed to the description of

each lot or parcel of land. This list must set forth the number of acres taken for right of way, stations, or other purposes, from each tract of land through which the road may run, describing the land as near as practicable in accordance with the United States surveys, giving the width of the strip or parcel of land, and its length through each tract; also, the whole number of acres and the aggregate value thereof in such county, town and city. All this is denominated real property, and such list must set forth the length of the main track and the length of all side tracks and turn-outs in each county, etc., through which the road runs, with the actual value of the same, and the value of the improvements at each of the several stations, where such stations are not a part of the city or town lots. This track and these stations are denominated "fixed and stationary personal property."

This list must also contain an inventory of the rolling stock belonging to the company with the value thereof. This rolling stock is denominated personal property. The list must also contain a statement of the value of all other personal property owned by the company, and must also state the length of the whole main track within the State and the total value of the rolling stock, which rolling stock is taxed in the several counties, towns and cities *pro rata,* in the proportion the length of the main track in such county, town or city bears to the whole length of the road; all other property must be listed and taxed in the county, town or city where the same is located or used. This section then proceeds to define the description of all lands owned by any railroad company for right of way or station purposes other than those which are a part of a laid off town, city or village, under which it shall be entered by the assessor in his books. Scates' Comp. 1166.

The second section provides, that this list or schedule of taxable property belonging to a railroad company shall be made to the county clerk, instead of the assessor, and the clerk is required to lay the same before the board of supervisors when they meet to equalize the assessment of property.

If a majority of this board are satisfied that the schedule is correct, they are required to assess the property according to it; but if they believe such schedule does not contain a full and fair statement of the property of the company subject to taxation in such county, made out and valued in accordance with the requirements of the law, the board is authorized to assess, or cause it to be assessed, in accordance with the rules prescribed for assessing such property. Scates' Comp. 1105.

The appellees, in the attempted performance of the duty enjoined on them by these statutes, presented their list, or schedule of their taxable property, for 1863, owned by them in Bureau county, to the clerk of the County Court, in all respects, as alleged by them, in strict compliance with the statute; which the clerk laid before the board of supervisors when they met to equalize the assessments in that county. This schedule presented an aggregate valuation of $282,383 27-100 of their property owned in Bureau county, which, by the action of the board was increased to $395,336 57-100, being forty per cent above the valuation by the company.

Availing of the act of 1861, by which an appeal is allowed to the Circuit Court from the action of the board of supervisors, the company took an appeal to the Circuit Court of Bureau county, and, by change of venue, the cause was transferred to La Salle county, in the Circuit Court of which county, at the March Term, 1866, such proceedings were had as resulted in a deduction by that court of the per cent thus imposed by the board of supervisors, leaving the schedule of the company as originally presented to the county clerk intact.

To reverse this judgment, the county of Bureau bring the case here by appeal, and assign various errors, which we have fully considered. . . . . .

For the appellees, the court instructed the jury, if the company valued their property in their schedule or return, so that it bore a just relation to other property in the county, then the board of supervisors had not power to increase the valuation, and they should find for the company; and, further, if the jury believed that the addition of forty per cent to the aggregate valuation returned by the company so increased the valuation that it bore an undue proportion of the taxes of the county, then such an increase was unwarranted by law, and the jury would be authorized to reduce the assessment, so that it would bear a proper proportion to such taxes, but they could not reduce it below the valuation fixed upon it by the company. Appellants asked instructions directly opposite to those given for appellees, which were refused by the court.

The instructions so given announce principles so congenial to justice, and so consonant with the principles of equity, and so reasonable, as to challenge the approbation of all right-minded men, and they ought to be sustained if they are in accordance with the law under which the proceedings were had. This, then, becomes the main point of inquiry.

It is insisted by appellees, that their property, by this addition of

forty per cent on its valuation, as returned by them to the county clerk, placed on it by the board of supervisors, has the effect to cause them to pay a greater proportion of the revenue than is demanded of individuals listing their property for taxation in the same county. If this be so, no just mind, with the Constitution of the State before him, could sanction the proceeding. The great central and dominant idea in that instrument is, uniformity of taxation; and no power exists, or should exist, in any corporate authority to go counter to this command of the fundamental law. A mode has been furnished by law by which this uniformity shall be attained; and that is, that property shall be assessed at its actual value, and the rate of taxation placed upon it shall be the same regardless of persons or ownership. Persons are elected to ascertain this value, and the rate is prescribed.

It sufficiently appears, that the schedule returned by the appellees to the clerk of the County Court, fixed the value of the property owned by them in Bureau county on the same, or on a more liberal basis, than the several assessors in the various towns fixed upon the property of individuals in the same county, though in neither case was the property valued at anything near its actual cash value. For instance, while the valuation of the property of individuals ranged from one-fifth to one-third of its cash value, that of the appellees ranged from one-third to one-half of its actual value.

The requirements of the law that each separate parcel of property shall be valued at its true value in money, though simple as a proposition, is not always easy to obey; nor is that requiring personal property to be valued at the usual selling price of similar property at the time of listing. So many elements enter into the price of an article, even one in common use, that it is difficult to put a selling price upon it. Upon railroad property it is still more difficult, as their personal property has no market value. Their property is *sui generis,* not affected by the principles of supply and demand, and is, for the most part, unsalable except in emergencies, when competing lines may need rolling stock or other portions of their equipments. It cannot be affirmed of a railroad in running condition, that its properties are marketable. What they cost is no evidence of their real value; nor do we know of any means an assessor or a board of supervisors may have at command by which to determine precisely the true value of their most valuable property. Their lands can be valued with the same, but with no greater facility than similar property of individuals; but the value of their track, and super-

structure, and rolling stock depends so much on contingencies that it seems almost impossible to fix its real value. But, assuming the values to be as fixed by the witnesses examined on this point, the return made by appellees shows that the valuation they fixed upon it, was from one-third to one-half of its appraised value. But we do not intend to go into the *minutiae*, but to announce simply the principles we recognize as legal and just, which should govern the whole subject. The question is before us in all its length and breadth: Can a railroad company, by any action of the corporate authorities of a county, be required to pay more than its fair share of taxes as compared with those paid by individuals? Does the power exist anywhere to destroy the cardinal principle of uniformity of taxation so forcibly and prominently insisted upon by the Constitution? This is a great question, affecting, not only railroad corporations, but every property owner and tax payer in the State.

It seems to us there is something so monstrous in the proposition as to be indefensible by fair argument.

Regarding uniformity as the vital principle, the dominant idea of the Constitution, where can the power reside to produce its opposite? Where is the power lodged, in view of this principle, to compel A to pay, on his land or personal property, of no more value than the same kind of property belonging to B, forty per cent more taxes than are assessed against B? We affirm such a power nowhere exists, and if it did it would be so revolting in its exercise to the lowest sense of justice with which our species is imbued as to justify any and every lawful expedient for relief against it.

The framers of our Constitution and our lawmakers, to their credit be it said, have kept steadily in view the principles of equality and justice, in adopting a system of taxation which commends itself to the favor and approbation of all well organized minds.

It is no argument to urge that the fault is with the assessors in the case of individuals, and with the railroad companies in making out their schedules for the county clerk. If the assessors violate their duty, are railroad companies to be the sufferers? If they neglect to act fully up to all the requirements of the law, is that any reason why A should pay forty per cent more taxes, in proportion to value, than B?

The rule adopted by the assessors in this State has grown into a custom, and has been tacitly sanctioned by every department of the government for a long course of years, and it is now too late to challenge it. Even so late as the last special session of the legislature, that body, by clear implication, acknowledged the custom

and yielded to its influence, by the provisions of the act to tax the shares in national banks. They therein impliedly declare that such shares are to be taxed the same as other property. A share of bank stock, under that bill, is not required to pay more State or local taxes than a piece of land, or a house, of equal value; and the plain inference is, if such property be assessed on only one-third of its actual value, bank stock shall be assessed on the same per cent of its actual value. Would not the sense of justice of every man in this community be outraged by allowing this or any other depreciation to one class of people, and demanding of another a higher tax on a similar article of the same actual value? The proposition cannot commend itself to the favor of any just man, and can receive no countenance in a court of justice.

It is admitted as a fact on both sides of this controversy, that the property of no one owner in the county of Bureau has been taxed on its real value, and that the per cent added by the board of supervisors to the valuation of the property of appellees imposes on them a greater proportionate burden than the law requires them to bear. We are of this opinion, and therefore consider the action of the board unfounded in justice, and in direct opposition to the Constitution. The great and attractive feature of uniformity has been disregarded by the board, and appellees victimized. It may be very desirable, that the greatest share of the public burdens shall be borne by these corporations, but until there is a radical change in our fundamental law it cannot be done. They stand on the platform of equality before the law, and no greater burden for the support of government can be imposed upon them than can be placed on the individual tax payer.

Entertaining these views, we must affirm the judgment of the La Salle Circuit Court. The action of the board of supervisors of Bureau county was *ultra vires,* and cannot be sanctioned by this court.

Judgment affirmed.

WALKER, Ch. J., dissenting.

II. Power of Exemption.

CALIFORNIA V. McCREERY.

Supreme Court of California. January, 1868.
34 California 432.

By the Court, Rhodes, J.:

. . . .

Another question, and one of much greater importance under our present revenue system, does arise in this case. The defendant objects to the tax on the ground "that the Legislature having, in defiance of constitutional requirements, imposed the burden of taxation upon a portion only of the property in the State, and expressly relieved a large portion from taxation, the law is neither equal nor uniform in its operation, does not tax 'all the property in the state,' and is therefore void."

The section of the constitution referred to is section thirteen of Article Eleven, and is as follows:

"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; but Assessors and Collectors of town, county and State taxes shall be elected by qualified electors of the district, county or town in which the property taxed for State, county or town purposes is situated."

. . . .

Construction or interpretation can scarcely make the meaning of the words more apparent, for there is no word in the clause of ambiguous or doubtful import. The meaning of taxation must be kept in view, and that is: a charge levied by the sovereign power upon the property of its subject. It is not a charge upon its own property, nor upon the property over which it has no dominion. This excludes the property of the State, whether lands, revenues or other property, and the property of the United States. That "all property in this State" does not mean either all that the Legislature may designate, or all except such as the Legislature may exempt, is as self evident as the axiom that the "whole is greater than a part." No process of reasoning or demonstration can make it plainer.

. . . .

It is provided by the second section of the General Revenue Act of 1857, as amended in 1859, (Stats. 1859, p. 343), that "all property of every kind and nature whatever within this State shall be subject to taxation, except" certain property therein specified. After

mentioning the property of the State, the counties and municipal corporations, and of the United States, the section enumerates colleges, school houses and other buildings for the purpose of education, public hospitals, asylums, poor houses and other charitable institutions for the relief of the indigent and afflicted, churches, chapels and other buildings for religious worship, together with lots of ground and other property appurtenant thereto; cemeteries and graveyards; the property of widows and orphan children to the amount of one thousand dollars; growing crops and mining claims.

If the power exists in the Legislature to exempt growing crops, mining claims and other property mentioned, the exemption may be carried still further, until property of one class is made to bear the whole burden of taxation. The exemption, so far as it includes private property, is in plain violation of the command of the Constitution.

. . . .

All property of the state and municipalities held for governmental purposes is impliedly exempted from taxation. Louisville v. Com., 1 Duv. 295; Rochester v. Rush, 80 N. Y. 302; Industrial University v. Champaign Co., 76 Ill. 283. There is some doubt as to property held in a private capacity by municipalities. Louisville v. Commonwealth, 1 Duv. 295.

In the absence of a constitutional prohibition the legislature may exempt property and persons from taxation. This results from the power the legislature has to select the objects of taxation and the application of the rule that nothing not selected for that purpose by the legislature is taxable. See Simpson v. Hopkins, 82 Md. 478. This case upheld a law which, while taxing mortgages of a corporation held by a resident on property subject to its jurisdiction, exempted non-interest bearing bonds and mortgages of individuals and building associations. But see Russell v. Curry, 164 Mo. 69, which holds this violative of 14th amendment.

As to the effect on the validity of a tax of the omission of taxable property from the assessment roll, see People v. Platt, 24 N. J. L. 108, *infra*.

PEOPLE EX REL. MEDICAL COLLEGE V. CAMPBELL.

Court of Appeals of New York. October, 1883.
93 New York, 196.

Appeal from order of the General Term of the Supreme Court, in the first judicial department, made January 17, 1883, which affirmed an order of Special Term, directing the issuing of a peremptory writ of *mandamus,* requiring defendant, as comptroller of

the city of New York, to cancel of record certain taxes imposed in 1881, upon lots in said city, leased by relator under an agreement that it should pay or procure the taxes thereon to be remitted.

The real estate was occupied and used as a medical college, hospital and free dispensary for women. The lots were assessed, for the year in question, to the owner, and the tax in question levied October 13, 1881. In November, 1881, the relator petitioned the department of taxes and assessments to have the property exempted. The commissioners signed and sent to the comptroller a certificate to the effect that they thereby exempted said property from taxation for the year 1881.

DANFORTH, J. We are of opinion that the case made by the relator does not bring the property in question within any provision of the statute allowing exemption from taxation. It is neither a building for public worship, nor in any sense the property of a religious society. Upon this point we agree with the court below. Neither is it exclusively used as a seminary of learning, nor is it the property of the New York Public School Society, and unless one or the other of these conditions attach, both building and premises remain liable to bear a just proportion of the public burden (Laws of 1852, chap. 282; 1 R. S. 31, chap. 13, tit. 1, § 4, subd. 3.) until relieved therefrom in some legal manner. The respondent claims that this result was reached when the department of taxes and assessments decided that the property should be exempt from taxation for the year 1881, and the serious question before us is whether there is authority for that conclusion. . . . . .

It is apparent from these provisions that under them no tax could lawfully be remitted except for cause, or property declared exempt from taxation at the arbitrary discretion of any of the officers intrusted at different times with the administration of municipal affairs. Excessive valuation might be reduced, and property exempt by law stricken from the roll, notwithstanding its owner's delay in applying for relief, but the statute must in all cases furnish the ground for exemption. None of these provisions have been repealed, and we discover no intent on the part of the legislature by the act in question (Laws of 1870, chap. 382, § 8, *supra*) to delegate to the commissioners the power of exempting property from taxation, nor when we consider it in connection with other statutes, can we conclude that they had any other object in view by its enactment than the substitution of the commissioners, and the exercise by them of powers, theretofore vested in the board of supervisors.

The certificate of the commissioners, therefore, was not author-

ized by law, and the relator was not entitled to a *mandamus*. The orders of the Special and General Terms should be reversed, and motion for *mandamus* denied with costs, and costs of this appeal.

All concur.

Ordered accordingly.

IN THE MATTER OF THE APPLICATION OF THE MAYOR & C. OF NEW YORK FOR ENLARGING AND IMPROVING NASSAU STREET.

Supreme Court of New York. January, 1814.
11 Johnson 77.

The commissioners appointed by the court, on the application of the corporation of the city of New York, pursuant to the 178th section of the act "to reduce several laws relating particularly to the city of New York into one act," passed 9th April, 1813, (2 N. R. L. 408) made a report of their estimate and assessment of the damage and benefit to the parties interested, &c., in enlarging part of Nassau street, by which, among other things, it appeared that they assessed the benefit of the proposed improvement to the following churches, to be paid by them, viz. on the French church Du St. Esprit, 1,273 dollars, the Presbyterian church in Wall Street, 1,981 dollars and 81 cents, and the Scotch Presbyterian church, in Cedar Street, 410 dollars. To this assessment the several churches stated their objections in writing to the commissioners. Several individuals, also, owners of houses and lots assessed, stated their objections to the report, on the ground of the assessment being inequitable and disproportionate. A motion having been made at the last term to have the report of the commissioners confirmed, the churches, by their counsel, as well as the individual proprietors, were heard in support of their objections.

Per Curiam. The churches are not well founded in their claim to a total exemption of their lots from assessments for opening, enlarging, or otherwise improving, streets in the city of New York, made in pursuance of the act of the 9th of April, 1813. (2 N. R. L. 408.) These assessments are intended and directed to be made upon the owners of lands and lots who may receive "benefits and advantage" by the improvement. The exemption granted by the act of 1801, was in the general act for the assessment and collection

of taxes; (1 N. R. L. 556.) (a) and the provisions of that act all refer to the general and public taxes to be assessed and collected for the benefit of the town, county, or State at large. The words of the exemption are, that no church or place of public worship, nor any school-house, &c., "should be *taxed* by any law of this state." The word "*taxes*" means burdens, charges, or impositions, put or set upon persons or property for public uses, and this is the definition which Lord Coke gives to the word *talliage* (2 Inst. 532.) and Lord Holt, in Carth. 438, gives the same definition, in substance, of the word *tax*. The legislature intended by that exemption to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister, not exceeding in value 1,500 dollars. But to pay for the opening of a street, in a *ratio* to the "benefit or advantage" derived from it, is no *burden*. It is no talliage or tax within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister, as well as of other persons, pay for such an improvement in proportion as it is benefited? There is no inconvenience or hardship in it, and the maxim of law that *qui sentit commodum debet sentire onus,* is perfectly consistent with the interests and dictates of science and religion. The legislature have, in several instances, given this construction to the exemption in question by recognizing as valid, similar assessments upon public property in New York. (Acts, sess. 34 c. 246, s. 30. Sess. 35, c. 239, s. 43.)

. . . .

Motion denied.

As a general thing it is held that a provision in a state constitution requiring equality and uniformity of taxation is applicable only to property taxes. People v. Coleman, 4 Cal. 46, *supra;* Newton v. Atchinson, 31 Kan. 151, *infra.* But some cases hold that such a provision makes impossible progressive inheritance taxes. State v. Ferris, 53 Ohio State, 314; State v. Switzler, 143 Mo. 287, and some go so far as to hold that all inheritance taxes are violative of a uniformity provision. Curry v. Spencer, 61 N. H. 624.

CHAPTER VII.

OFFICIAL ACTION IN MATTERS OF TAXATION.

SMITH V. MESSER.

Superior Court of Judicature of New Hampshire. 1845.
17 New Hampshire 420.

Writ of Entry. John Smith, the late husband of the plaintiff, conveyed to the Manufacturers' and Mechanics' Bank, a corporation in Massachusetts, the James Hugh farm, so called, in Colebrook, a part of which farm is demanded in this suit. . . . . .

A part of the farm was assigned to the plaintiff as her right of dower. . . . . . And she went into possession under the assignment, and so remained until divested by the defendant.

The plea is the general issue.

The defendant claimed title by virtue of a deed from a collector of taxes under his sale. . . .

. . . .

The plaintiff takes the following . . . . exceptions to the validity of the sale:

. . . .

15. That Hutchinson was not legally collector of taxes for the year 1842, because he did not give a bond, with sureties, to the town within six days of his choice, or at any time.

. . . .

GILCHRIST, J.

. . . .

It sufficiently appears that Hutchinson was *de facto* collector, exercising the functions of that office under color of an election; and it was held in *Tucker* v. *Aiken,* 7 N. H. Rep. 113, that the acts of an officer *de facto* are in general valid, so far as the rights of third parties are concerned; and that the regularity of his appointment is not to be collaterally inquired into in proceedings to which he is not a party. The case of *Cardigan* v. *Page,* 6 N. H. Rep. 182, is there adverted to, and the doctrine which it seems to establish declared to be untenable. The giving of bonds, or the contrary undoubtedly would have affected the tenure of his office, had proper measures

been instituted for the purpose of testing its validity, but has no bearing upon the fact that he was in the open exercise of the functions appertaining to the office, and was collector in fact.

. . . .

SNELL V. THE CITY OF FORT DODGE ET AL.

Supreme Court of Iowa. June, 1877.
45 Iowa 564.

Action in equity to restrain the collection of city taxes on certain real property belonging to the plaintiff, situate within the corporate limits of the defendant, on the grounds, as stated in the petition: . . . . . 3. That the county auditor on his own motion and without authority of law placed said levy on the tax lists and determined the tax upon said property from the valuation of the township assessor, made in 1869. . . . . .

The answer denies the material allegations in the petition, and defendant insists there was a valid assessment and levy and the substantial requirements of law complied with.

There was a reference and a finding that there was no valid assessment, and the taxes illegal and void. The finding was confirmed by the court, a decree accordingly entered and defendants appeal.

SEEVERS, J.

. . . .

III. It is urged that the plaintiff and other taxpayers were deprived of the right to appear before the board of equalization, which at that time was composed of the township trustees, and they were required to meet for the performance of that duty on the first Monday in May. Chap. 89, Laws of the Thirteenth General Assembly. The argument of the appellee is based on the assumption that as the assessor of 1870 did not qualify until after the first Monday in May the board of equalization could not have had before them the assessment made by him. But as such assessor had no duty to perform as to real property assessed in 1869, and could not under the law assess the same, the assumption is not legally correct. The assessment of 1869, together with all corrections made therein by the board of equalization of that year, if any such there were, in the absence of any showing to the contrary must be presumed to have been in existence and in the custody of the county auditor at

the time fixed by law for the meeting of such board in 1870. Such books are public records, open to the inspection of all. There is no showing made whether or not the board met on the appointed day, but the presumption is, and must be under such circumstances, that they performed their duty at the proper time required by law. It must be further presumed, in the absence of any showing to the contrary, that such board had before them the proper books and papers to enable them to perform their duties. Such being the case, the plaintiff was not deprived of the opportunity of having the assessment of his property corrected, and he was not, therefore, deprived of any substantial right.

. . . .

For the reasons stated, the decree of the Circuit Court will be reversed, and a decree entered in this court, if counsel for appellant so elect, in accordance with this opinion.

Reversed.

CHAPTER VIII.

CONSTRUCTION OF TAX LAWS.

EDWARD A. CORNWALL, EXECUTOR, V. JAMES TODD.

Supreme Court of Errors of the State of Connecticut. September, 1871.

38 Connecticut 443.

Bill in Equity, by the petitioner as executor of the will of Thomas D. Moss deceased, for an injunction to restrain the levy of a tax warrant; brought to the Court of Common Pleas for New Haven county, and reversed, on facts found, for advice. The case is sufficiently stated in the opinion.

CARPENTER, J. The petitioner is the executor of the will of Thomas D. Moss, deceased. In the year 1869, he made and returned to the assessors of the town a list of the taxable property of the estate, not in his own name as trustee, but in the name of "Thomas D. Moss's estate." At that time the estate had not been distributed or finally disposed of by the court of probate. There was included in the list real estate and money at interest. Thomas D. Moss at the time of his death resided in the fifth school district in the town of Cheshire, where his widow still resides, and where the real estate named in said list is situated. The petitioner resides in the first school district. The fifth district laid a tax on the list of 1869, including in the rate bill a tax against the estate of said Moss on the real and personal property in said list. The respondent is the collector of said tax. This petition is brought to restrain him from collecting the tax on the sum of four thousand dollars money at interest.

. . . .

2. The petitioner in the next place claims that said personal property was not legally taxable in the fifth school district, for the reason that it was not the property of any person resident therein. The statute, section 130, page 349, is as follows: "Whenever a district shall impose a tax, the same shall be levied on all the real

estate situated therein, and upon the polls and other ratable estate, except real estate situated without the limits of such district, of those persons who are resident therein at the time of laying such tax."

The question practically resolves itself into this: Who, for the purposes of taxation, is to be regarded as the owner of this property? We think we may with propriety say that it belongs to the estate. It does not belong to the executor, except in a limited sense. . . . . . It does not belong to the heir before distribution; and ordinarily the legatee has no claim until the debts are paid. In common parlance we speak of the property as *the estate*; and of the different items of property as belonging to the estate. And when the statute authorizes the executor to put the property in the list in the *name* of the deceased person's estate, it regards the estate as an intangible being or person capable of owning property. The executor or administrator represents that being, and speaks and acts for it, and in its name and behalf.

Again. So far as the property is concerned, and for the purposes of collecting and paying debts, and doing justice by others, the acts and doings of a deceased person while in life still continue to affect the living. In a certain legal sense, therefore, and for certain purposes, he still lives, and will continue to live until those purposes are fully accomplished. As he is incapable of acting for himself, the executor or administrator represents him. The law requires this property, while in a transition state from the dead to the living, to bear its proportion of the public burdens. For the purposes of taxation, therefore, it must have a *situs*. None can be more appropriate than the place where the deceased lived and died. I apprehend, therefore, the true rule to be this: The personal property of a deceased person is taxable, during the settlement of the estate, in the place of domicil of the deceased. When it comes into the possession of the heir or legatee, it must be taxed in the place where the heir or legatee resides. When it goes into the hands of a trustee, under the will or otherwise, then the statute governs it, and it must be taxed where the trustee resides, or where the person resides for whose use it is held in trust, as the case may be. Such a rule is in harmony with all the provisions of the statute, is easily understood, can be easily applied, and will work no injustice.

The greatest and perhaps the only objection that can be urged against this rule is, that we cannot say in strictness that the deceased or his estate is a resident of the district. This objection assumes that the statute is to be strictly construed. But we do not

think that the doctrine of strict construction should apply to it. Statutes relating to taxes are not penal statutes, nor are they in derogation of natural rights. Although taxes are regarded by many as burdens, and many look upon them even as money arbitrarily and unjustly extorted from them by government, and hence justify themselves and quiet their consciences in resorting to questionable means for the purpose of avoiding taxation, yet in point of fact no money paid returns so good and valuable a consideration as money paid for taxes laid for legitimate purposes. They are just as essential and important as government iself; for without them in some form government could not exist. The small pittance we thus pay is the price we pay for the preservation of all our property, and the protection of all our rights. But there is not only a necessity for taxation, but it is eminently just and equitable that it should be as nearly equal as possible. Hence it is the policy of the law to require all property, except such as is especially exempted, to bear its proportion of the public burdens. Not only so, but the law manifestly contemplates that property rated in the list shall be liable for all taxes—town and school district taxes alike. This is evident from the provision that district taxes shall be laid on the town list, with special provision for certain changes rendered necessary in order to tax all the real estate situated within the district, and none situated without, and also to assess the tax in each instance upon the right person. In construing statutes relating to taxes, therefore, we ought, where the language will permit, so to construe them as to give effect to the obvious intention and meaning of the legislature, rather than to defeat that intention by a too strict adherence to the letter.

Again. The same process of reasoning which would exempt this property from taxation in the district, on the ground now under consideration, would also exempt it from all taxes. The 3d section of the act, page 706, provides, that the assessors shall give public notice "requiring of *all persons in such town* who are liable to pay taxes &c." The words italicised have the same meaning in respect to towns, that the words, "persons who are residents therein," have in respect to school districts. It is not denied, however, that the town may tax it, as the statute expressly provides for putting it into the list. Another statute requires the district tax to be laid on the town list; and there is no provision for a change in respect to this kind of property. Property in the tax list is subject to district taxes, unless otherwise provided by statute. As there is no

special provision affecting this property, we think it was properly taxed.

For these reasons we advise the Court of Common Pleas to dismiss the bill.

In this opinion the other judges concurred.

PEOPLE EX REL. OTSEGO COUNTY BANK, RESPONDENT, V. BOARD OF SUPERVISORS OF OTSEGO COUNTY, APPELLANT.

Commission of Appeals of the State of New York. January, 1873. 51 New York 401.

Appeal from an order of the General Term of the Supreme Court in the sixth judicial district, reversing an order of the Special Term and granting a peremptory mandamus against the defendant.

In the year 1863, the relator had, as part of its capital, $65,000 invested in the stocks of the United States, and for the assessment of that year paid upon such stocks taxes to the amount of $812.50, besides collector's fees. In the year 1864, it had, as part of its capital, $91,000 invested in stocks of the United States upon which it paid for the assessment of that year a tax of $6,670.30, besides collector's fees.

In November, 1867, the relator, claiming that such taxes had been unjustly paid on the ground that such stocks were exempt from taxation, applied to the defendant under the act, chapter 938 of the Laws of 1867, to have such taxes audited and allowed, as provided in said act.

The defendant refused to allow the claim, and then the relator, upon affidavits and notice of motion, applied to the Special Term of the Supreme Court for a mandamus to compel the allowance of the claims, and the court ordered that the defendant, "without delay, determine, audit, and allow the said claims, and levy the amount thereof by tax, as required by said act, or show cause" at a time named.

EARL, C. Prior to 1863, the taxation of banks formed under the laws of this State, was regulated by chap. 456 of the Laws of 1857, which provided that "the capital stock of every company, liable to taxation, except such part of it as shall have been excepted in the assessment roll or shall have been exempted by law, together with

its surplus profits or reserved funds, exceeding ten per cent of its capital, after deducting the assessed value of its real estate and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as the other personal and real estate of the county." Under this law the court of appeals held, in the *People* v. *Commissioners of Taxes and Assessments,* (23 N. Y. 192), that stocks of the United States, owned by banks, were not exempt from taxation. That case was taken by writ of error to the Supreme Court of the United States, and there the judgment was reversed (2 Black. 620); the court holding that that portion of the capital of a bank, invested in the stock, bonds or other securities of the United States, was not liable to taxation by State authority. That decision was announced in March, 1863, and, doubtless for the purpose of avoiding the effect of it, in April, 1863, the legislature passed an act (chap. 240) which provided as follows: "All banks, etc., shall be liable to taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in, and their surplus earnings (less ten per cent of such surplus), in the manner now provided by law, deducting the value of the real estate held by such corporation or association, and taxable as real estate." It was under this statute that the taxes in question were imposed. The courts of this State again held that the banks could be taxed "on a valuation equal to the amount of their capital stock," notwithstanding a portion of their capital stock was invested in United States stocks; but the decisions were again reversed by the Supreme Court of the United States (*Bank Tax Case,* 2 Wall. 200), that court deciding that the tax imposed under that law was still a tax upon the property of the banks, and that so much of such property as was invested in United States stocks was exempt from taxation. That decision was not announced until after the taxes in question had been paid and collected. It follows that these taxes, although voluntarily paid, were illegally exacted, and that the relator had a just claim to have them refunded. But it, as well as other banks similarly situated, was without any remedy by which it could enforce repayment, and hence the act (chap. 938, Laws of 1867), entitled "An act providing for relief against illegal taxation" in Herkimer and other counties was passed.

The first section of the act provides that the boards of supervisors of the several counties mentioned are "authorized and empowered, upon the application of any party aggrieved, to hear and

determine any claim of an assessment for taxes made in their respective counties upon United States bonds, stocks or securities, any or all of them which by law are or have been exempt from taxation, and to repay to the proper person the amount collected or paid upon such assessment." Section 3, provides that, whenever such claim shall be audited and allowed, the board of supervisors shall levy the amount thereof upon the taxable property of the county.

The first question to be determined is whether this act was merely permissive or mandatory to boards of supervisors. To determine this question, not only the language of the act, but the circumstances surrounding its passage and the object had in view, must be considered. The highest judicial authority in the land had decided that these taxes were illegally exacted. The relator, therefore, had a claim, based upon natural justice and equity, that the taxes should be refunded, and as there was no way to compel the counties to refund them this act was passed. The title of the act shows that it was to provide "relief against illegal taxation." This relief would be quite illusory if it were left to the absolute discretion of the board of supervisors of any county to refund the taxes or not, as it might see fit. The act recognizes the party who has paid these taxes as an aggrieved party, who has a claim against the county, which is to be audited and allowed like other claims against the county. It is not to be presumed that the legislature intended that the counties and towns which had the benefit of this illegal taxation should have the option, through their supervisors to determine whether they would do justice to the wronged tax-payers by refunding the taxes illegally exacted, or not. The purpose of the act, as well as the simplest justice, requires that we should hold that it is mandatory upon the respective boards of supervisors, unless there is something in the plain language used that forbids such a construction. The words "authorized and empowered" are usually words of permission merely, and generally have that sense when used in contracts and private affairs; but when used in statutes, they are frequently mandatory and imperative. In Dwarris, p. 604, the rule is laid down as follows: "Words of permission shall in certain cases be obligatory. Where the statute directs the doing of a thing for the sake of justice, the word *may* means the same thing as the word ***shall.***"

In *Rex* v. *Barlow,* (2 Salk. 609), it is said that where the statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall." That

was a case under 14 Car. II, ch. 12 which gave power and authority to the church-wardens, etc., to make an assessment to reimburse the constables; that statute was held to be imperative, for the reason that both the public and the constable had an interest in having the authority exercised.

In *The King* v. *The Inhabitants of Derby,* (Skinner, 370), a motion was made to quash an indictment found against the inhabitants "for refusing to meet and make a rate to pay a constable's tax." The ground for the motion was that the statute was not imperative, but merely they "may meet," etc. The court, however, held *may,* in the case of a public officer, was tantamount to *shall.*

In *Supervisors* v. *United States,* (4 Wallace 435), a statute of Illinois provided that the board of supervisors "may, if deemed advisable, levy a special tax," etc. This language was held to be peremptory, and not merely permissive. Mr. Justice Swayne sums up the authorities on the question as follows: "The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given not for their benefit, but for his. It is placed with the depositary to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless."

In *The City of Galena* v. *Amy,* (5 Wallace 705), where an act amending a city charter said that the city council "may, if it believe that the public good and the best interests of the city require" it, levy a tax to pay its funded debt, it was held a mandamus would lie, at the suit of a judgment creditor, to make it levy the tax.

In *The Mayor, etc., of the City of New York* v. *Furze* (3 Hill 612), Chief Justice Nelson, after citing and commenting on many cases, laid down the rule as follows: "Where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely and not peremptory."

These authorities are abundant to show that the language used in the act under consideration must be construed to be imperative, and that the board of supervisors was commanded to hear and de-

termine, audit and allow the relator's claim, and cause the tax illegally paid to be refunded.

. . . .

I am, therefore, of the opinion that the order should be affirmed, with costs.

All concur.

Order affirmed.

TORREY V. INHABITANTS OF MILLBURY.

Supreme Judicial Court of Massachusetts. October, 1838.
21 Pickering. 64.

SHAW, C. J., delivered the opinion of the court.

The plaintiff seeks in this action to recover back a sum paid as a town tax upon a warrant of distress, upon the ground that the tax was illegally and irregularly assessed.

The first objection to the irregularity of the assessment is, that the assessors did not comply with the directions of the statute, in making out the list containing the valuation and assessment of polls and estates, inasmuch as it did not exhibit in distinct columns, "the true value of real estate," "the reduced value of real estate," and the same of personal estate, but only one column for real and one for personal, headed "value." Revised Stat., c. 7, § 15, 29, 30. The Revised Statutes in the sections cited, require that the lists, amongst other particulars, shall distinguish the "true value," and "reduced value." The question is, whether this irregularity renders the valuation and assessment void, so that each person taxed may take advantage of it, and recover back the amount paid.

In considering the various statutes regulating the assessment of taxes, and the measures preliminary thereto, it is not always easy to distinguish which are conditions precedent to the legality of the tax, and which are directory merely, and do not constitute conditions. One rule is very plain and well settled, that all those measures, which are intended for the security of the citizen, for ensuring an equality of taxation, and to enable every one to know, with reasonable certainty, for what polls and for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent, and if they are not observed he is not legally taxed, and he may resist it in any of the modes authorized by law for contesting the validity of the tax.

But many regulations are made by statute, designed for the information of assessors and officers, and intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which, does in no respect affect the rights of tax-paying citizens. These may be considered directory; officers may be liable to legal animadversion, perhaps to punishment, for not observing them, but yet their observance is not a condition precedent to the validity of the tax. On consideration, the Court are of opinion, that the requirement in the statute, in regard to "reduced value," is of the latter character.

We take it to be clear, that the requisition in question is founded on the common custom of forming a column of "reduced value," which had existed before the statute, adopted for the ease and convenience of computation in apportioning the taxes. But the "reduced value" is of course a fixed proportion of the true value, as a half, or quarter, 10 per cent or the like. The true value is first estimated by the assessors in the manner provided by law, that is, by returns, or, in default of returns being made, by appraisement, and then the column of reduced value is found by computation, upon a uniform scale of reduction. It follows therefore as a necessary consequence, that whether there be a column of reduced value or not, makes no difference as to the actual amount of property, for which each one on the list is assessed, or the rate which each and every one will have to pay. It is a requisition merely affecting the mode of framing the tax list, not affecting in any degree the rights of any tax-payer, and therefore the Court are of opinion, that it is directory, not a condition precedent, and that the failure to comply with it, on the part of the assessors, did not render the tax illegal or void.

. . . .

4. Another exception to the regularity of the tax paid by the plaintiff is, that it included $100 to build a town road, recently laid out by the selectmen. It appears by the report, that although there was a warrant "to see if the town would accept the road recently laid out, etc.," and though there was a vote to accept, yet that no location of the road with the boundaries and admeasurements thereof, had been made by the selectmen, and no report of such laying out, with the boundaries and admeasurements thereof, had been filed in the office of the town clerk, seven days before the meeting. These preliminary proceedings are required by the Revised Statutes, c. 24, § 69, and a report from the selectmen was required by the former statute. St. 1816, c. 67, § 1. So that

whether the vote was before or after the Revised Statutes, which is left a little uncertain on the report, we think there were no proceedings of the selectmen for the town to act upon, and therefore the vote of the town was inoperative and void. The vote to raise money by a tax for the building of this road, was consequently premature and invalid, and the plaintiff was not bound to pay it.

But as this is an action of assumpsit, to recover back money which the plaintiff was not liable to pay, and as it is entirely practicable to distinguish that part of the tax which was valid from that which was void, the Court are of opinion, that the plaintiff is entitled to recover back that part of the money paid by him which was assessed upon him as his share of the $100, assessed on account of the road.

As the warrant of distress was rightly issued for the other part of the tax, which the plaintiff wrongfully refused to pay, he has no right to recover back the costs attending the service of the warrant of distress.

PRICE V. MOTT.

Supreme Court of Pennsylvania. 1866.
52 Pennsylvania State 315.

This was an action of trespass q. c. f., etc., commenced September 5th, 1859, by Oscar H. Mott against Gilbert E. Palen, George W. Northrop and William Price.

In 1825 Mordecai Roberts owned a title by warrant to a tract of unseated land. A survey of the land was made December 28th, 1852, returned and accepted. On the 12th of June, 1854, the land was sold for taxes to Mott, the plaintiff, who received the treasurer's deed therefor. On the 8th of March, 1856, Mott paid taxes on the land for 1854 and 1855. John T. Cross, on the 25th of April, 1856, became owner of an undivided interest in the land, and for the purpose of redeeming it, on the 11th of June, same year, paid to the treasurer the amount of taxes *for which it was sold,* costs and penalty, but did not pay the taxes which Mott had paid *after* his purchase. Palen and Northrop derived their title by conveyance from Cross, and from some other heirs of Roberts. There was proof of cutting and carrying away timber by Price, but the principal question was title to the land. The court (Barrett, P. J.), amongst other things, charged:

"Did Cross do all that the law required of him? We think not. The act of 8th of May, 1855, declares, that 'in addition the owner shall pay the taxes which the purchaser shall have paid, which have accrued since the sale, and before the time allowed to redeem has expired.' The act is positive in its terms, and applies as well to the sales of 1854 as to any subsequent sales. On the 8th day of March, 1856, before any offer was made to redeem, the purchaser paid into the office the taxes which had accrued for the years 1855 and 1856. The owner was bound to pay that amount in addition to what he did pay. It is no sufficient answer to say that he did not know of the existence of the Act of Assembly. He was bound to know the law. He did not comply with it, and the jury are instructed that the attempted redemption was incomplete, and therefore void."

There was a verdict against Price for $100.

The above portion of the charge was assigned for error.

The opinion of the court was delivered May 15th, 1866, by

WOODWARD, C. J. We are of opinion that the redemption was effectual. It was made within two years after the tax sale was made, by one whose interest entitled him to redeem, and he paid all the redemption-money which the treasurer demanded.

When an owner of unseated lands presents himself at the treasurer's office and offers to pay taxes or redeem lands from tax sales, the treasurer, as a public officer, has duties to perform, the neglect of which cannot fairly be charged against him who is doing for himself all that the law enjoined. *Baird* v. *Cahoon,* 5 W. & S. 540. If the taxes which Mott had paid for the years 1854 and 1855 ought to have been charged to Cross as part of the redemption-money, it was the treasurer's fault that they were not. They appeared upon the treasurer's books, and he had what Cross had not—notice that they had been paid. It was his duty, therefore, to demand them, and Cross is not to be damaged by his neglect: *Bubb* v. *Tompkins,* 11 Wright 359.

But we have great doubts whether these taxes were demandable under the Act of 8th of May, 1855, Purd. 997. There is nothing in the terms of the act to compel a construction which would give it retroactive effect, and we always construe statutes as prospective and not retrospective, unless constrained to the contrary course by the rigour of the phraseology. These taxes were assessed and paid before the enactment. When they were paid the law did not require them to be added to the redemption-money, and though the redemption-money was paid more than a year after the enactment,

it is by no means clear that it was the treasurer's duty to add them then. But if it was, his official neglect cannot invalidate Cross's act, however it may ground a liability of the treasurer to Mott. And a valid redemption defeated the plaintiff's title altogether, so that, quite irrespective of all the other questions upon the record, he ought not to have been permitted to recover.

The judgment is reversed, and a *venire facias de novo* awarded.

DREXEL & CO. V. COMMONWEALTH.

Supreme Court of Pennsylvania. July, 1863.
46 Pennsylvania State 31.

READ, J. The Act of 16th of May, 1861, requires all stock, bill and exchange brokers and private bankers, on or before the first Monday of December next, and on or before the same day of each year thereafter, to make a written return, under oath or affirmation, to the auditor-general of this Commonwealth, in which return shall be exhibited and set forth the full amount of receipts from commissions, discounts, abatements, allowances, and all other profits arising from the business during the year ending the thirtieth day of November preceding the date of such annual return, and shall forthwith pay into the state treasury three per centum on the aggregate amount contained in such return for the use of the Commonwealth. The third section imposes a penalty of $1,000 for every neglect or refusal to make such return. Drexel & Company were stock, bill and exchange brokers and private bankers, and neglected and refused to make any return in 1861. The court below decided they were liable to the penalty, and gave judgment for the Commonwealth. The act clearly intended to levy a tax of three per centum on the profits or income of the business, and was not meant to tax capital. Profits must necessarily be the net profits of the business, and the Commonwealth was to receive of them three per cent. It was in fact a tax upon the income of the business in which the defendants were engaged. The English income tax and the United States income tax are based upon the incomes received in preceding years. The present United States income tax is laid upon the incomes received in the year 1862, and the act of Congress of the 5th of August, 1861 (12 Stat. at Large, 309), expressly declares that "the tax herein provided shall be assessed

upon the annual income of the persons hereinafter named, for the year next preceding the first of January, 1862, and the said taxes, when so assessed and made public, shall become a lien upon the property or other sources of said income for the amount of the same, with the interest and other expenses of collection until paid."

It is clearly therefore perfectly constitutional as well as expedient, in levying a tax upon profits or income, to take as the measure of taxation the profits or income of a preceding year. To tax is legal and to assume as a standard the transactions immediately prior is certainly not unreasonable, particularly when we find it always adopted in exactly similar cases. The tax is graduated upon each individual upon his individual receipts.

The penalty imposed upon all persons refusing or neglecting to give a list as required by the Act of Congress (12 Stats. at Large, 235), is $100, whilst our penalty is $1,000 upon a similar offence, by a particular class of moneyed operators. The objection that the penalty is *ex post facto* is not founded in fact, for it is imposed for the non-performance of a duty long after the passage of the act.

The court below have confined the operation of the act in the present case to the period between its passage and the 30th of November, 1861, during which time it was clearly the duty of the defendants to keep such accounts as might enable them to make the return required by law. As no return of any kind was made, it is unnecessary for us to say whether we might not have been still more lenient as to the time to be comprised in the return, if a return had been actually made, and a good reason assigned why it could not be made more explicit, and in strict conformity to the requirements of the law. . . . . . .

The judgment is affirmed.

CHAPTER IX.

CURING DEFECTS IN TAX PROCEEDINGS.

McCREADY V. SEXTON & SON.

Supreme Court of Iowa. June, 1870.
29 Iowa 356.

COLE, Ch. J.

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VI. It was objected that the evidence of the record of sales, certificates, etc., were incompetent, because the tax deed was conclusive as to those and other facts. On the other hand it is objected that the deed is neither conclusive nor *prima facie* evidence of any but the three facts specified. The latter objection is based upon this reasoning, to-wit: so much of section 784 as declares the treasurer's deed conclusive evidence that all the prerequisites of the law to make a good and valid sale, and vest the title in the purchaser, were done, except as to the three particulars: the liability of the land to taxation, the non-payment of taxes, and non-redemption from sale, is unconstitutional and void; that the declaration that the deed shall be conclusive evidence being inoperative, and there being no statutory declaration that it shall be *prima facie* evidence, the deed stands as at common law, and proof must first be made of the facts authorizing it, before the deed itself can be introduced.

The power of the legislature to declare that the tax deed shall be conclusive evidence that all the prerequisites of the law were complied with, has never been directly adjudicated by this court. Such power is denied, as being in violation of that clause of the constitution of our state (and common to all state constitutions) which declares that "no person shall be deprived of life, liberty or property without due process of law." Art. 1, section 9.

. . . .

Let us now examine the question more carefully and critically in the light of both principle and precedent. The right of taxation and the right of eminent domain are the highest sovereign rights. They are essential to and necessarily inhere in every

sovereign power. They are different rights and are differently exercised, and though absolute and sovereign in their character, they are nevertheless to be exercised only in accordance with certain fundamental principles. And although the taking of property by taxation is not strictly, or in its technical sense, the taking of property by due process of law, yet it has never been held or claimed that the legislature might confiscate property for the non-payment of taxes thereon. A process prescribed by law, has ever been held necessary in order to the rightful exercise of the taxing power. No person has ever claimed, and certainly no court has ever decided, that it would be competent for a legislature to declare that if the owner of real estate failed to pay the proportion of taxes due thereon, on or before the date named, that any other person might pay the tax and thereby become owner of the land. But, on the contrary, it has ever been held, that certain steps must be taken before the right to demand the tax, or to sell the property for the non-payment thereof arose. These acts, it is true, are such as are absolutely or relatively necessary in order to ascertain and fix the proper amount of taxes chargeable to each item of property. These steps while they are not by the books technically "due process of law," nevertheless, are very analogous to the steps ordinarily attending judicial proceedings *in rem.*

There is, first, the *listing and assessing* of the property. These may be likened to the seizure of the property by judicial process, whereby the jurisdiction over the *rem* attaches. Then, secondly, there is the *levy* of the tax upon the property, in proportion to its value, so much per centum. This may be likened to a judgment *in rem,* condemning the property to the payment of the claim for which it was seized. Then, thirdly, there is the *tax warrant,* or an express statutory provision, authorizing the collector to sell the property for the payment of the taxes thus levied upon it. This is very like the order or execution issued by the court for the sale of the *rem,* which had before been seized and condemned by it. Then, fourthly, there is *the sale* of the property by the collector under the authority conferred by the tax warrant under the statute, or by the statute itself directly. This is like the sale of the *rem* by the officer under the order or execution issued by the court. These, it must readily be seen, are essential to the exercise of the taxing power; and no revenue law could be of practical effect without them; and it may safely be said that every revenue law contains them. This *listing* is necessary in order to describe and identify the property; the *assessing,* in order to ascertain its value;

the *levy*, in order to fix the proportion or rate of the tax; the *tax warrant*, or statutory provision, in order to authorize some person to receive the taxes and to sell in default of payment; and *the sale* in order to contract the property to one who will pay the taxes due upon it. These are essential and jurisdictional, and every other provision of every other revenue law may safely be said to be directory only, and not essential to the exercise of the taxing power.

The legislature may prescribe the time or manner in which these essential and jurisdictional acts shall be done, but it cannot, either constitutionally, or in the nature of things, provide for the passing of title to property for the non-payment of taxes without them. As to the time or manner in which they shall be done, the discretion of the legislature is absolute and supreme, and cannot be judicially controlled or interfered with. Having the right to prescribe the manner, it may also rightfully provide that a failure to comply with its directions as to the manner shall not defeat the end; or that no person shall question the legality of the manner; or that any subsequent fact or act shall be either *prima facie* or *conclusive* evidence that the law as to time or manner was complied with. In other words, the legislature being supreme, may prescribe the time and manner of doing the act, and may make that, or any other time and manner which the persons doing it may adopt, legal and sufficient. But this power of the legislature extends only to those things over which it is supreme. As to the essential and jurisdictional facts, so to speak, which the legislature cannot annul or change, it cannot excuse the non-performance of them, and, of course, cannot make the doing of any other thing a substitute for them or conclusive evidence of their being done. To restate the proposition succinctly: whatever the legislature is at liberty to authorize or not, it may waive or estop denial; but not so as to that which it must require.

It follows, therefore, upon principle, that it is not competent for the legislature to make the tax deed *conclusive* evidence of a compliance with the essential prerequisites we have above named. That such an enactment is in conflict with the constitutional provision above quoted. That it deprives a man of his property without due process of law. Not that the exercise of the power of taxation is or is not due process of law; but that, in a suit between the tax purchaser, or his vendee, and the owner, which is a judicial investigation, "due process of law" means a trial; and a trial involves the right of both parties to produce evidence. If one party only is

allowed to produce evidence, and the other is estopped or concluded from producing his, such denial is effectually depriving him of his property without due process of law. Let us turn now to precedent or authority.

Judge Cooley, in his recent and most excellent "Treatise on Constitutional Limitations," says (p. 368): "But there are fixed bounds to the power of the legislature over this subject (rules of evidence) which must not be exceeded. As to what shall be evidence, and who shall assume the burden of proof, its power is unrestricted, so long as its rules are impartial and uniform; but it has no power to establish rules, which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon similar reasons, it would not be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations, the law of the land requires a trial; and there is no trial if only one party is suffered to produce his evidence. A statute making a tax deed conclusive evidence of a complete title, and precluding the original owner from showing its invalidity, would therefore be void as not a law regulating evidence, but an unconstitutional confiscation of property. *Groesbeck* v. *Seeley,* 13 Mich. 329; *Case* v. *Dean,* 16 Id. 13; *White* v. *Flynn,* 23 Ind. 46; *Smith* v. *Cleaveland,* 17 Wis. 556; *Allen* v. *Armstrong,* 16 Iowa 508; *Wantlan* v. *White,* 19 Ind. 470; *People* v. *Mitchell,* 45 Barb. 212."

. . . .

In *The People ex rel. etc.* v. *Mitchell et al.,* 35 N. Y. 55, it was held by a majority of the court (three judges dissenting) that the legislature might, by a curative act, make certain affidavits, taken under a previous act, conclusive evidence of certain facts stated in them, notwithstanding their defects. The court say, that the purpose is apparent from the further provisions, that "no defects in any such affidavits shall invalidate such proof," and that "the bonds shall be valid and binding on said town, without reference to the form or sufficiency of such affidavits." This case simply construes the curative act, and holds, in effect, that the failure to comply with the original act shall not defeat the right. See S. C. in 45 Barb. 208. It was evidently competent for the legislature to effect the result in two ways, either by declaring the bonds valid and binding, notwithstanding the failure to comply with all the forms of the law, or to make the affidavits conclusive proof of compliance therewith.

See, as to power of legislature to pass curative and retroactive laws, *The State etc.* v. *Squires,* 26 Iowa 340, and authorities there cited.

The case of *Smith* v. *Cleaveland,* 17 Wis. 556, appears to hold that it is competent for the legislature to make the tax deed conclusive; but the opinion expressly states that "the objections taken, and for which the plaintiff seeks to impeach the title of the defendants, go merely to the regularity of the proceedings. The groundwork and essence of the transactions which resulted in the execution and delivery of the deed remained untouched." It may be remarked that Judge Cooley in his Constitutional Limitations, note to page 369, cites this case as showing how far "the legislature may make the tax deed conclusive evidence that *mere irregularities* have not intervened in the proceedings." If the language of the opinion goes further than this, it is, as to such excess, doubtless, but mere *dictum.* There is referred to in the opinion and appended to the report in this case in the form of a note, an opinion of Miller, U. S. district judge for the district of Wisconsin, in the case of *Lord* v. *The Milwaukee & Mississippi Railroad Company,* seeming to sustain the broad language used by Dixon, C. J., in the main case; but the facts in the last case are not given so as to enable the reader to determine whether, as to its full extent, it is *adjudication* or partly *dictum.* But in the subsequent case of *Smith* v. *Smith, etc.,* 19 Wis. 615, Dixon, C. J., in delivering the opinion of the court says: "The legislature have power to prescribe the form of proceedings in the assessment and collection of taxes *and, in matters of form,* may declare what steps shall or shall not be essential to the validity of a tax sale or tax deed," and cites in support thereof *Smith* v. *Cleaveland, supra.* In view of all the facts and surroundings of the case, we do not think it can be recognized as deciding that it is competent for the legislature to make a tax deed conclusive evidence of title or of a compliance with the essential prerequisites of the statute. We have selected the foregoing cases, as being the strongest found in the reports within our reach, tending to sustain the power of the legislature to declare an act or instrument conclusive evidence of a legal right or title. None of them *decide* in favor of such power. Nor do the following cases so decide; but we have not space for an extended statement or review of them: *Rhinehardt* v. *Schuyler,* 2 Gilmn. 473; *Hannel* v .*Smith.* 15 Ohio 134; *The People etc.* v. *The Mayor, etc.,* 10 Wend. 398; *Gwynne* v. *Neiswanger,* 18 Ohio 400; *Steadman* v. *Planters' Bank,* 2 Eng. (Ark.) 424.

In *Wantlan* v. *White,* 19 Ind. 470, which was a proceeding by *habeas corpus* in behalf of an enlisted minor, who had taken the

usual oath of his age. His discharge was resisted on the ground that the act of congress provided that "the oath of enlistment taken by the recruit shall be conclusive as to his age." The court held, "that it is not competent for the legislative power to declare what shall be conclusive evidence of a fact." And in *Gavin* v. *Sherman,* 23 Ind. 32, the court, in passing upon a statute which declared that the "tax deed shall be conclusive evidence of the truth of all facts therein recited," held, that it should be strictly construed; and expressly waived deciding the question whether the legislature has the power to pass such a statute. The court do not in anyway refer to *Wantlan* v. *White, supra.* But at the same term, the court, in the case of *White* v. *Flynn,* 23 Ind. 46, use the following language: "The statute enacts that the deed shall be conclusive evidence of the facts recited, etc. Now, we do not suppose the legislature could make such an enactment. See *Wantlan* v. *White,* 10 Ind. 470."

In *Groesbeck* v. *Seeley,* 13 Mich. 329; *Quinlon* v. *Rogers,* 12 id. 169; and *Case Dean et al.,* 16 id. 12, a statute making a tax deed conclusive evidence of title was held absolutely void, as being in conflict with the constitutional provision guaranteeing due process of law for the protection of life, liberty and property.

. . . .

We conclude, therefore, upon principle as well as upon precedent and authority, that the legislature does not possess the power to declare the tax deed to be conclusive evidence of compliance with those matters which are *essential* to the exercise of the taxing power. But as to the *non-essentials or matters merely directory,* such power may exist, and the deed become conclusive of their due performance.

VII. The further question then arises, can the tax deed be received as *prima facie* evidence of compliance with the essential prerequisites as to which, and others the statute declares it to be *conclusive evidence?* As we have already seen, it is competent and constitutional for the legislature to make the tax deed *prima facie* evidence of its own validity, but they have not the constitutional power to make it *conclusive* evidence.

. . . .

In this case, by the section of the act under consideration, the legislature undertook to declare two things: first, that the tax deed should be evidence of its own validity; and second that it should be conclusive, that is that no evidence should be received to contradict it. This latter declaration, so far as it applies to matters material and essential to the taxing power, as we have seen, it was not competent

for the legislature to do, and hence, as to such matters, the word "conclusive" must be regarded as stricken out. The tax deed would thereby be made evidence, but not conclusive evidence of those facts.

It follows from these conclusions, that the judgment of the district court, for the error in the instructions of the court on the subject of fraud, and the finding of the jury thereon, must be reversed.

Reversed.

WRIGHT, J., dissenting.

As to the effect of tax deeds see in Chapter XI under III, *Effect of Tax Deeds.*

IN THE MATTER OF THE CONFIRMATION OF THE REPORT OF THE COMMISSIONERS OF ASSESSMENT FOR GRADING AND PAVING AND OTHERWISE IMPROVING SACKETT, DOUGLAS AND DE GRAW STREETS IN THE CITY OF BROOKLYN.

Court of Appeals of New York. May, 1878.
74 New York 95.

EARL, J. The assessment in question was laid for the expense of grading and paving De Graw and Douglas streets, and for grading, paving, ornamenting and otherwise improving Sackett street, in the city of Brooklyn. It is assailed on the ground that the legislation which purports to authorize the improvements was unconstitutional and void; and also upon the ground that the proceedings taken under the laws were not in conformity to them and were irregular and unauthorized.

. . . .

It cannot well be said that the Legislature transcended its power in the character of these street improvements. They were somewhat extraordinary, and very expensive and extravagant. They may have been hurtful rather than beneficial, but the legislature has power to determine where and when streets shall be constructed, and their width and mode of improvement, and the courts cannot sit in review upon its action in such matters.

. . . .

Notwithstanding the defects in the three acts which have now been referred to, the park commissioners proceeded with the improvement of the three streets last named, and on the 1st day of June,

1874, had nearly completed the same. On that day an act was passed (ch. 588), entitled "an act to provide for the completion and improvement of Sackett, Douglas and De Graw streets, in the city of Brooklyn, and also for the collection and payment of all moneys expended. or indebtedness incurred by said city on account of the improvement of such streets by the Brooklyn park commissioners."

. . . .

We are of opinion that this assessment was authorized by the act of 1874, and that that act was a valid exercise of legislative power.

. . . .

Section two of the act of 1874 gives ample authority to make the assessment in question. Here was an expense incurred by public officers, under acts supposed to be valid, in the improvement of public streets. The expense was to be either a tax upon the whole city or upon the property owners benefitted, and it cannot be doubted that the Legislature had the power to determine how the assessment should be made. The Legislature can adopt and sanction an improvement or an expenditure which it could previously authorize. It may authorize an assessment for an improvement, either before or after the improvement is made, as in its judgment is deemed best. A complete system was provided for the imposition of the assessment by the orderly methods usually resorted to, and it is impossible to perceive how the power of the Legislature to enact section two can be successfully questioned.

. . . .

I have thus as briefly as I could, and yet with the care the importance of the case demands, examined these crude and imperfect acts, and I am of opinion that none of the objections now made to the assessment are well founded and that the order appealed from must be affirmed, with costs.

All concur.

Order affirmed.

As to legislative provision for reassessment, see note to Matter of McPherson, 104 N. Y. 306, *infra*.

PARISH V. GOLDEN.

Court of Appeals of New York. September, 1866.
35 New York 462.

MORGAN, J. There is an omission in the affidavit annexed to the assessment roll which is supposed, by the appellant's counsel, to be fatal to the validity of the warrant under which the collector seized the plaintiff's property. The statute prescribes a certain form of affidavit, and that form has been followed except in one particular. The statute requires the assessors, among other things, to make an affidavit "that the assessment roll contains a true statement of the aggregate amount of the *taxable* personal estate of each and every person named in such roll over and above the amount of debts due from each person respectively, and including such stocks as are otherwise taxable (and such other property as is exempt by law from taxation) at the full and true value thereof." (Laws of 1851, p. 334, § 8.) The words omitted are contained in brackets, and the question is, whether they are material in order to give the supervisors jurisdiction to levy the tax. For, if the supervisors had jurisdiction to issue the warrant, this action cannot be maintained. According to the decision of the court in *Van Rensselaer* v. *Whitbeck* (1 N. Y. 517), if the assessment roll is not complete and in a condition to be delivered to the board of supervisors they have no jurisdiction to issue a warrant for the collection of taxes.

It is obvious, however, that the omission of the assessors to comply with an important provision of the statute regulating their duties cannot be regarded as a jurisdictional defect without subjecting *public* officers to unnecessary vexation and embarrassment. In my opinion, the principle of that case (*Van Rensselaer* v. *Whitbeck*) ought not to be extended. If every omission is to be regarded as a jurisdictional defect, then it is apparent that the whole tax is vitiated wherever such an omission is discovered. The supervisors, must necessarily, enter upon the discharge of their duties and examine the assessment rolls of all the towns. Defects in the assessment rolls of one town, or in the form of the affidavits endorsed thereon, will not have the effect of stopping their proceedings. The public interests require them to proceed and make the necessary corrections, when it can be done without interfering with the rights of the tax payers. Having entered upon their duties, I think it would be competent for them to send for the assessors of any one town to come before them and supply omissions and make the necessary affidavits, where the omission occurred through accident or mistake.

Now, it does not appear in this case that the assessors neglected any duty imposed upon them in respect to the assessment of the personal property of the town of Oswegatchie. For aught that appears, they excluded from the valuation such as was exempt by law from taxation. It does not appear, *affirmatively,* that the assessors neglected any duty which was necessary to the protection of the rights of the tax payers of Oswegatchie. The case is, therefore, clearly distinguishable from *Van Rensselaer* v. *Whitbeck,* where it appeared, by the certificate of the assessors, that they had estimated the real estate of the town of Greenbush not according to its value, but as "they deemed proper," and the personal not "according to their best information and belief of its value," "but according to the usual way of assessing." Nothing of the kind appears in the case at bar; and I think it ought not to be *assumed* that the assessors failed to make a legal estimate of the valuation of the property of the town of Oswegatchie, for the purpose of invalidating the tax warrant. The usual presumption as to public officers is, that they have done their duty. And I am clearly of the opinion that the omission of the assessors to certify or make an affidavit as to some particular required of them in relation to the assessment, is not to be regarded as a jurisdictional defect. If they have proceeded legally, an informal certificate or affidavit ought not to be regarded as fatal to the jurisdiction of the supervisors to proceed and levy the tax, and the court will not presume that the assessors have neglected any duty imposed upon them by statute from their mere omission to certify it in their affidavit indorsed on the assessment roll. If it contains substantially the matters required by statute, the defect may be disregarded. If the omitted part is material, it may be supplied and corrected. The proceedings of the board of supervisors cannot, I think, be interrupted by the neglect of the assessors of a particular town to make a formal verification of the assessment roll within the time limited by statute for that purpose; and if the duty has been discharged, the public interests require that the necessary verification should be allowed to be subsequently made. In case of willful neglect of any assessor to make the necessary verification, he will incur a forfeiture of fifty dollars. (1 R. S., Edm. ed., 366, § 29.) The object of the verification is to secure fidelity on the part of the officers, and this may be enforced by a prosecution for the penalty.

I have not thought it necessary to examine into the question whether the omission of the assessors to state in their affidavit that they had excluded from valuation property exempt by law from taxation, was a mere repetition of what they had already stated, or

whether it related to real or personal property, or both. The statute exemption applies to both real and personal estate (1 R. S., Edm. ed., 360, § 4); although the language of the affidavit seems to apply only to personal property.

I think we ought to place our decision in this case upon a broader foundation. This affidavit is in the nature of a verification of the assessment roll, and comes in the place of a certificate of the regularity of the assessment. (Laws of 1851, 344, § 8.) The old certificate did not contain the words omitted in this affidavit. (1 R. S., 394, § 26.) It may doubtless be regarded as repetitious, as the assessors had already stated that the assessment roll contained a "true statement of the aggregate amount of the *taxable* personal estate." When it is added that they had also excluded *non-taxable* property from their valuation, it is substantially the same thing in a different form. But if it is a material statement, the omission of it ought not to be regarded as fatal to the assessment roll. Its omission is not evidence that the assessors have not performed their duty in making the valuations. It is like an informal verification in judicial proceedings, and, I think, subject to correction and amendment. There is nothing in the nature of the verification showing that it may not be made after the delivery of the assessment roll to the supervisors as well as before, and I am of the opinion that the duty of verifying the assessment is to be regarded as *directory* rather than jurisdictional. (See *People* v. *Allen,* 6 Wend. 486; *Torrey* v. *Millsbury,* 21 Pick. 64; *Howard* v. *Proctor,* 1 Gray 128.)

. . . .

The judgment should be affirmed.

Concurring, LEONARD, PORTER and WRIGHT, JJ., and DAVIES, Ch. J.

HUNT, J., read an opinion for reversal, in which PECKHAM, J., concurred.

Judgment affirmed.

GIBSON V. BAILEY.

Superior Court of Judicature of New Hampshire. July, 1838.
9 New Hampshire 168.

PARKER, C. J.

. . . .

This brings us to the proceedings of the town under which the land was sold for taxes, and the proceedings of the collector in making the sale.

And here it is admitted that there are divers defects which are fatal if they cannot be cured. 6 N. H. Rep. 182, *Props. of Cardigan* v. *Page; ditto* 194, *Nelson* v. *Pierce.*

The return of the posting up of the warrant for the town meeting is insufficient. It does not state when it was posted up. Nor does it show that it was posted at a public place.

It does not appear that Thirston, who was chosen collector, took the oath of office prescribed by law.

And there are defects in the return of the collector, to which exceptions have been taken.

The tenants move that these proceedings may be amended.

It has already been settled that the records of towns may be amended, to conform of the truth of the fact. 3 N. H. Rep. 513, *Bishop* v. *Cone,* 11 Mass. 477; *Welles* v. *Battelle,* 6 N. H. R. 182.

The amendment must be made by the person who was in office at the time. 2 Pick. 397, *Taylor* v. *Henry.*

It seems probable that in the prior cases where amendments have been allowed, the officers who were permitted to make them were not in office at the time; if they were, it must have been under a subsequent election, and the right to have the amendment made cannot depend upon the question whether the officer has again been elected.

The form in which such amendments are to be made, has never yet been settled. It would be very dangerous to sanction alterations of the books themselves, by erasures and interlineations. And we are of opinion that they should be made only upon evidence showing the truth of the facts, and then by drawing out in form the amendment which the facts authorize. The amendment, with the order under which it is made, may then be annexed to the books where the original is recorded, so that the whole matter will appear; and, in furnishing copies, the original and amendment should both be furnished.

But it is objected, on the part of the defendant, that no amend-

ment ought to be made to her prejudice. That when she purchased, these defects in the vendue title were apparent, and she must be presumed to have purchased with knowledge that the title was defective.

The general rule is, that amendments of records are made with a saving of the rights of third persons, acquired since the existence of the defect. 4 N. H. Rep. 116, *Chamberlain* v. *Crane;* 6 *ditto*, 459, *Bowman* v. *Stark*.

To apply this rule, however to all cases of defects in sales of land for taxes, would, in effect, be very nearly denying a right to amend; as the owner of the land sold would attempt to defeat any amendment, by conveying to some friend, who would bring a suit in his behalf. It would, at least, be necessary to confine the application of the principle to cases where the land had been actually conveyed *bona fide*.

But instances might exist, where the purchaser, although he might not have found upon the records all that was necessary to make a formal and valid record, might have been well assured, from what he did find, that all that was necessary had in fact been done.

For instance, in relation to the two first defects in the records in this case—in the return of the warning of the meeting, and in the record of the oath of the collector—although these records are not sufficient in point of law, they lead the mind of any one to the belief that what was requisite was probably done. And in such cases, where the fact appears to be stated, but not in a formal manner, there is no reason that he who purchases should not be subjected to the same liability to have the amendment made, and the record put in form, that his grantor would have been, had he attempted to recover the land.

There are cases, where, although all that is required may not appear of record, it may be left to a jury to presume that all that was required was done. As in *Bishop* v. *Cone*—although the application of the principle in that case may, perhaps, have been questionable, on account of the transactions having been so recent, that, if the truth would have warranted it, an amendment might have been made. Whether that principle could have been applied against a subsequent purchaser, it is not necessary to determine. But where what is necessary is, although not formally stated, so far set down as to lead to a belief that a correct record might have been made, there seems to be no reason why a purchaser, who has access to the records, should not take it subject to a right to have the record put in form, if the truth will warrant it.

Where, on the other hand, nothing appears upon the record in relation to any particular fact necessary to make out a title, nor is anything set down from which it is naturally to be inferred that the fact existed, a subsequent *bona fide* purchaser ought not to have his title defeated by supplying a record instead of amending a record.

Upon these principles, if the facts will warrant it, the return in relation to the meeting may be so amended as to show the time when the warrant was posted up, it being stated in the original record to have been fifteen days before the meeting; and that Francis Chase's, where it is stated to have been posted, was a public place. So as to the record stating that Thirston, the collector, was "qualified by Francis Chase, Esq.;" an amendment may be made, setting forth that the oath, prescribed by law, was administered to him by Francis Chase, a justice of the peace.

So, if the truth will admit of it, the return of the collector, that he "proceeded to open the vendue at one o'clock P. M.," etc., may be amended, by stating that the sale was closed before six o'clock, P. M.—and to the fact, that it was struck off to Gage, may be added that he was the highest bidder, if such was the fact.

We must first have evidence to show that these amendments may be made with truth; and, if made, they must be upon such terms as shall appear to be just, when the whole matters are before us.

The objection that the return of the collector is not recorded, but only put on file, cannot avail. N. H. Laws, 565.

CHAPTER X.

LISTING OF PERSONS AND VALUATION OF ESTATES FOR TAXATION.

I. THE NATURE OF AN ASSESSMENT.

MATTER OF McPHERSON.

Court of Appeals of New York. February, 1887.
104 New York 306.

EARL, J. Mary McPherson died in the city of Albany on the 6th day of February, 1886, leaving a will which was admitted to probate by the surrogate of Albany county. In her will she bequeathed legacies to various persons who were in no way related to her, and upon the petition of the district attorney of that county the surrogate ordered the executors named in the will to pay the succession tax imposed by chapter 483 of the Laws of 1885. The executors and several of the legatees appealed from the decision of the surrogate to the General Term and from affirmance there to this court. The claim on the part of the appellants is that the act of 1885 is, for various reasons, unconstitutional and void, that the tax was not, therefore, lawfully imposed, and that its collection and payment cannot be rightfully enforced.

. . . .

This tax is imposed according to the value of the legacy and collateral inheritance liable to be taxed, and hence there must be some mode of ascertaining that value; and for that purpose judicial action is requisite at some stage of the proceeding before the liability of the taxpayer becomes finally fixed. He must have some kind of notice of the proceeding against him, and a hearing or an opportunity to be heard in reference to the value of his property, and the amount of the tax which is thus to be imposed. Unless he has these, his constitutional right to due process of law has been invaded. *Stuart* v. *Palmer,* 74 N. Y. 183; *County of San Mateo* v. *S. Pac. R. R. Co.,* 8 Sawyer 238; *Hagar* v. *Dist. No. 108,* 111 U. S. 701. This act is assailed as unconstitutional and void because it is claimed it does not give the taxpayer such notice and hearing.

While the provision for notice is not as clear and explicit as it might have been, yet we are constrained to believe that it is sufficient. . . . . . With a view of upholding the constitutionality of the act, this and all other sections of the act must be liberally construed, as no act of the legislature may be condemned as unconstitutional, if by fair implication or any just construction of its language it can be upheld. The surrogate who has admitted a will to probate, or granted letters of administration, will ordinarily have in his possession information as to the persons interested in the estate to be administered; and hence this section imposes upon him the duty of selecting the persons to whom notice is to be addressed by the appraisers; and, as all persons interested are entitled to notice, it is a fair inference that it was intended that he should direct notice to be given to all such persons. He is a judicial officer in whose court proceedings are conducted in an orderly manner, and all persons interested in any question to be determined by him are entitled to notice and a hearing. It was intended that this proceeding for the imposition of a tax should be conducted in an orderly way as is required in other proceedings in his court. Therefore, when the section provides that he shall designate by order to whom the notice is to be given, it is necessarily implied that he shall designate all the persons entitled to notice. If he should omit to do so, it would be an error on account of which any tax imposed upon the person not notified or heard would be invalid as having been imposed without jurisdiction.

It is also provided, that, immediately after he has assessed the tax, the surrogate shall "give notice thereof by mail to all parties known to be interested therein." This gives a further opportunity to the taxpayer to be heard. Upon receiving the notice, if he has had no prior notice or hearing, he may apply to the surrogate and ask for one, and it would be his duty to grant it. The proceeding is in court before a judicial officer and whatever a taxpayer can ask as a matter of constitutional right, it is the duty of the surrogate to grant.

Then there is the right of appeal provided for in the same section. Any person dissatisfied with the appraisement or assessment may appeal therefrom to the surrogate of the proper county, on paying or giving security to pay all costs and the tax as fixed by the court. Upon such appeal there is another opportunity to be heard. The appeal is not limited to questions of law, but may be taken to the surrogate upon both the facts and the law, and he has ample power to correct any error brought to his attention. For the

purpose of making such correction, he is not bound by the estimate of the appraisers, or by the facts which appear before him; but he may hear such new evidence and allegations as may be properly presented to him.

. . . .

So, in all of these modes we think there is sufficient provision for notice and hearing for all parties interested in the tax, and we have no doubt that the act secures to every taxpayer due process of law so far as it is applicable to cases of taxation.

It is also objected that the act confers powers upon surrogates' courts not authorized by and contrary to the Constitution. There is nothing in the Constitution which in any way specifies or defines the powers or duties of surrogates. They are recognized in various sections of the Constitution and they have been known to the laws of the State since the foundation of our government. Their jurisdiction has been from time to time defined in the statutes, and from time to time extended and enlarged. Surrogates' courts have always had jurisdiction of the administration, adjustment and settlement of the estates of deceased persons, and the imposition and collection of this tax are simply incidents in the final settlement and adjustment of such estates, and are in no way foreign to the jurisdiction which has generally been exercised by such courts, certainly not so foreign as to make the act obnoxious to any constitutional objection.

. . . .

We are, therefore, of opinion that there is no constitutional objection to this act which affects this case, and that the judgment should be affirmed with costs.

All concur except RAPALLO, J., not voting.

Judgment affirmed.

See also county of San Mateo v. South Pac. R. Co. 13 Fed. Repr. 722 *Supra.* See as to license and privilege taxes, McMillen v. Anderson, 95 U. S. 37 *Infra.* See also Dollar Savings Bank v. United States, 19 Wallace 227. The legislature may constitutionally provide for reassessment where original assessment was invalid or incomplete. Sturges v. Carter 114 U. S. 511; Gallup v. Schmidt, 183 U. S. 300.

CITY OF TAMPA V. KAUNITZ.

Supreme Court of Florida. June, 1897.
39 Florida 683.

CARTER, J.

The assignments of error complain, first, that the court erred in overruling the demurrer to the petition; second, that the court erred in declaring the assessment of petitioner's property unlawfully made.

1. We think a proper consideration of all substantial questions suggested by the demurrer to the petition can be had by ascertaining (A) whether the assessment for taxes of 1896 was void because made by Biglow, instead of the auditor of the city of Tampa.

. . . .

A. We think the first question must be answered affirmatively. Section 4, Chapter 4496, approved May 29, 1895, being the present charter of the city of Tampa, provides that, "the government of said city shall be carried on by the following officers: . . . . . auditor who shall be the assessor of taxes."

. . . .

By section 10 it is provided that the mayor shall, by and with the consent of the city council, appoint some suitable person to be called the auditor of said city, who shall give such bond as the council may direct and whose duty and compensation shall be fixed by ordinances, except as herein provided. Section 31 makes it the duty of the tax assessor of the city, between April 1st and July 1st of each year, to ascertain by diligent inquiry all taxable personal property and all taxable real estate in the city and the names of the persons owning the same on April 1st in each year, and to make an assessment of all taxable property. It requires him to visit and inspect all real estate and affix a valuation thereon, and he is to require the owners of personal property to return and value same under oath, which he is authorized to administer, and any person refusing to make such oath is not permitted afterward to reduce the valuation of such personal property for that year. By section 34 the assessor is required to value all personal property not returned under oath according to his best judgment and information. Other provisions of the charter require the assessor to make out assessment rolls in the manner specified therein, to meet with the city board of equalization on the first Monday in July of each year, for the purpose of reviewing the assessment rolls, to calculate

and carry out the several amounts of taxes, after the amount to be raised has been determined, and after completing the rolls to append to them an affidavit as to the correctness of the rolls and of the valuations of property made by him, and to issue and attach to the original roll a warrant in the form prescribed by section 38, commanding the tax collector to collect the taxes therein by sale of the assessed property. The charter of the city having expressly committed these duties relating to the assessment of taxes to the auditor, the city had no power to transfer them to any other person. City of Tampa v. Salomonson, 35 Fla., 446, 17 South. Rep. 581. We do not understand that the resolution of the city council, referred to in the petition, undertook to transfer the duties of tax assessor from the auditor to the persons authorized to be employed by the finance committee. The persons so employed were merely assistants to the auditor in making the assessment. No new office was attempted to be created by this resolution, nor did the resolution attempt to authorize the employee to make the assessment exclusively of the auditor. Biglow, the employee under this resolution, did not pretend to be the rightful auditor or assessor of the city. . . . . . He was a mere employee of the council, having and claiming no other or higher rights or duties than those of an assistant to the auditor in the matter of making city assessments of taxes. Biglow was not, therefore, an officer *de facto* whose acts as such would be valid as to third persons, as was the case in the Town of Kissimmee City v. Cannon, 26 Fla. 3, 7 South. Rep. 523. . . . . We think it is absolutely essential to the validity of a tax levy, that the assessment be made by the officer authorized by law to make it. The person making the assessment must be that officer, either *de jure* or *de facto*. We do not mean to intimate that the officer must personally perform every act connected with the assessment and the making of the tax roll. Many of these acts are of a clerical nature, involving no exercise of discretion, and having no relation to any right of the tax payer. A very large portion of these duties consists in transcribing upon the rolls the various assessments, and in calculating the amounts of taxes levied thereon. The assessor may call to his assistance the services of other persons, whether officers or not, in the performance of all clerical or ministerial duties, and the assessment will not be invalid for that reason if the work of the others is done under his supervision, or is ratified or adopted by him.

But if the assessor, either from neglect or because of other pressing duties devolving upon him, permits his assistants to perform

all the duties relating to the assessment for a whole tax year, while he abstains from any duty connected therewith, an assessment so made will be utterly void, and it is the duty of the courts to so declare it. The reasons are succinctly stated by Mr. Blackwell (Tax Titles, vol. 1, sec. 168) as follows: "The statute being the authority, and the officer the agent to execute it, and no one being empowered to do the act except the persons specially designated in the law for that purpose, it follows that a stranger to the power cannot execute it. The power is conferred upon the officer, not the man. It is an official, not a personal trust. It does not rest upon confidence, but upon official responsibility. Hence the only security of the proprietor of the estate is the official character of the person to whom the power is committed. This security mainly depends upon the responsibility of the officer to the government, the sanctity of his oath of office, and his liability to those whose rights are violated by his wrongful acts. . . . . . The citizen is entitled to all the protection against fraud, rapacity, and abuse of authority, in the sale of his property, which official responsibility can secure." The petition distinctly avers that the auditor or assessor performed no "duties whatever connected with the assessment of taxes for the city of Tampa during the year 1896;" that "the said assessment was made by the said Biglow exclusively and that the legal assessor of the city of Tampa had nothing whatever to do with the assessment aforesaid." If these allegations are true, the assessment of petitioner's personal as well as real property was void.

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FELSENTHAL ET AL. V. JOHNSON.

Supreme Court of Illinois. September, 1882.
104 Illinois 21.

Mr. Justice Walker delivered the opinion of the Court:

This was a bill filed to restrain the collection of taxes levied for State, county and local purposes, for the year 1878, against appellants, as private bankers. They furnished the assessor with a list of what they claim was all of the property in their hands subject to taxation. The assessor subsequently notified them to appear on a specified day, for the purpose of fixing the assessable amount of their property. One of the members of the firm applied at the

office of the assessor at the time named, and submitted to an examination as to the taxable property in their hands. The valuation was not then fixed. One of the appellants says he asked if his explanation was satisfactory, when the assessor replied he would let him know, but never gave him any notice.

The assessor fixed the value of the property at a much larger sum than it was returned by appellants, and it is claimed, and there is evidence tending to show, appellants were not notified of the amount of the valuation. The hearing before the assessor was on the 13th day of August, 1878. Felsenthal swears he accidentally learned that the assessor had fixed the value higher than he had returned it, some days after, while the county equalizing board was in session, and that he filed with the clerk of the board of commissioners objections to the amount fixed by the assessor, and that the clerk said to him he would inform him when it would be necessary to testify before the board. The clerk testifies that he has no recollection of the matter, nor does the record show anything in reference to it. He says he directed parties to file the objections with the committee on equalization, etc., which was in daily session; that the committee, when it acted on objections, usually returned the papers to him, and he filed them, but was unable to find any as to this assessment. Felsenthal testifies the clerk informed him the committee referred the objections back to the assessor, but the clerk does not sustain him in this. It is not claimed that appellants, or any one of them, appeared before the committee to obtain a reduction or to have the claim of over-assessment corrected. No other steps were taken than what is claimed above. On the hearing the court below dismissed the bill, and appellants seek to reverse that decree.

In matters of revenue, courts of equity rarely grant relief, and never where the party has means of obtaining relief at law, and fails or refuses to pursue his legal remedy, or shows an equitable excuse for such failure. The statute has provided ample means for the correction of errors in assessments of property for taxation, by an appeal to the town board of review, and again to the county board. These appeals are provided for and regulated by the 86th and 97th sections of the Revenue law. The first provides that property assessed as this was, after the fourth Monday of June, the time for the meeting of the town board of review, shall be subject to complaint to the county board, under the rules regulating the town board of review. The 97th section provides there shall be a meeting of the county board on the second Monday of July in each year, and on the application of any person considering himself aggrieved,

"they shall review the assessment, and correct the same as shall appear to be just." The statute thus provides ample means for all grievances in the assessment of property for taxation, whether by over-valuation, or by imposing the assessment on property not subject to taxation, or on property not owned or liable to be assessed to the tax-payer. It embraces every kind of grievance in the assessment; and even where there is a supposed grievance, the tax-payer has but to appear, make his complaint known, and have a hearing. If appellants felt themselves aggrieved they had but to appear and state their complaint, and be heard. This they failed to do, and so failing, chancery will not assume jurisdiction to review the assessment. They failed to pursue their remedy at law, and can not appeal to equity for relief against their own neglect.

It is urged that relief should be granted under the equity head of accident. We fail to see that there was any accident. Appellants knew the amount of the assessment in time to appeal to the county board to have it corrected. They knew that the board was in session, and they failed to attend and prove there was an over-assessment. Although the assessment was made too late for an appeal to the town board of review, it was in time for a review by the county board, and they were apprised of the fact, and made some slight effort to bring the matter before the board. Felsenthal testifies he filed objections with the clerk, who promised to notify him when he should appear before the board to testify. If he constituted the clerk, as he says, his agent, and the clerk failed to notify him, the neglect of his agent was his, and he must be held responsible for that neglect. No such accident is shown as equity regards as ground for relief. To entitle a party to equitable relief when he has not availed of his legal remedy, he must have used every reasonable effort to have employed it.

It is urged that the assessor, without notice or hearing, changed the assessment of appellants' property, and this is ground for equitable relief, and decisions of this court are cited in support of the doctrine. The authorities have no application, because the record fails to show that such a change was made by the assessor. There was but one assessment on his books, and that was made after one of appellants submitted to the examination on the 13th day of August. The assumption seems to be that the schedule returned by appellants was the assessment, and that the larger sum placed on the assessor's books was an alteration of the assessment. This is not true. The assessor, and not the tax-payer, makes the assessment. The latter is required to make and return the schedule to enable

the assessor to perform the duty of assessing the value of the property. Until the assessor approves the schedule, or makes a new one and fixes the valuation of the property, there is no assessment. The act is official, and must be performed by the assessor. It is his judgment, and not that of the tax-payer, that controls. We fail to find that the valuation of this property was ever changed after it was fixed by the assessor, whose duty it was to fix the amount. The cases therefore have no application to the facts in this case. Appellants objected that the value was placed at too large a sum. The assessor's valuation is presumed by the law to be correct, and it devolves upon the taxpayer to overcome that presumption by proof. He offered no proof to establish that objection. He did not appear before the committee and have a time fixed for a hearing, nor did he do any act to have his evidence heard. He could have availed of the means of learning when he could be heard by the committee.

There is no evidence that the committee referred this objection back to the assessor. It only appears that the clerk informed one of appellants that there was such action by the committee. It was but hearsay evidence, at most. If such was the action, we presume it appears of record somewhere, or there was legitimate evidence of the fact, and could have been produced. But if the evidence had been heard, we do not determine now whether it would constitute ground for relief.

The decree of the court below is affirmed.

Decree affirmed.

But see Moors v. Street Comrs. 134 Mass. 431, where it is held that the assessment may not be raised without giving the taxpayer opportunity to be heard, nor except as provided by the statute. Under some statutes assessors may raise on evidence not submitted to taxpayer. Kansas, etc., R. R. Co. v. Ellis Co., 19 Kan. 584. If by mistake the taxpayer includes in his list exempted property he is not concluded by his list but may subsequently claim an abatement as to exempted property. Charlestown v. County Coms. 109 Mass. 270.

Often a heavy penalty is imposed for neglect to make a return. These penalties are usually upheld—See Drexel v. Commonwealth, 46 Pa. St. 31 *Supra.* See also Porter v. Co. Coms. 5 Gray 365; *Ex parte* Lynch, 16 S. C. 32; W. U. Tel. Co. v. Indiana, 165 U. S. 304; Caldwell v. State, 14 Texas Appeals, 171.

MATTER OF CAGER.

Court of Appeals of New York. November, 1888.
111 New York, 343.

RUGER, Ch. J.

. . . .

We are thus brought to the only question in the case, which is, whether the children of Mary Griffin took such an interest in the property devised by the will of William Cager as subjected them to the payment of a tax thereon by force of the acts referred to? This question is to be determined by a consideration of the provisions of that will. The portions affecting the question read as follows:

"First. After all my lawful debts are paid and discharged, I give, devise and bequeath all my estate, both real and personal, of what nature and kind soever, to my wife, Mary Cager, to be used and enjoyed, and *at her disposal* during the term of her natural life.

"Secondly. I give and devise one-third of my real estate and personal property, *that may remain* at the decease of my wife Mary Cager, to my adopted daughter Mary Griffin, that is to say, the use of the said one-third during her natural life.

"Thirdly. I further devise and bequeath, at the decease of my wife Mary Cager, the *remaining* two-thirds of my real estate and personal property to the present heirs of the aforesaid Mary Griffin, namely, Eva Griffin, William C. Griffin, Frank Griffin and George Griffin, share and share alike.

"I further devise and bequeath, that at the decease of my adopted daughter Mary Griffin, the one-third (as above stated) of which she has had the use, shall be divided between the present heirs of aforesaid Mary Griffin, share and share alike."

The report of the appraiser, appointed by the surrogate to appraise the value of the property devised to the various legatees, shows that he assessed the value of the estate devised, respectively, to the children of Mary Griffin, upon two theories, leaving the question to the surrogate to determine upon which theory, if any, the tax should be assessed. Upon the theory that the widow took a life estate only in the property, he found the value of that devised to the several children of Mary Griffin to be the sum of $640.96 each; but in case the interest devised to the widow was an estate in fee, or a life estate with power of disposition, he was of the opinion that such legacies had no market value whatever.

The surrogate adopted the former view and assessed the value at the sum named by the appraiser. In this we think he erred. We are of the opinion that the widow took a life estate in the property devised with a limited power of disposition for her use and enjoyment, and that any interest in the other legatees was dependent upon the contingency whether the power of disposition was exercised by the life tenant during her life. The meaning and effect of the will must be sought in the language employed by the testator, and when that is discovered, must be carried into effect by the court.

The language giving all of his estate to his widow, to be used and enjoyed and at her disposal, followed, as it is, by a limitation over of such of the estate as might remain at the decease of his wife, clearly imports an intention to confer upon the widow the power to dispose of the *corpus* of the estate. (*Van Horne* v. *Campbell,* 100 N. Y. 287; *Smith* v. *Van Ostrand,* 64 id. 278; *Terry* v. *Wiggins,* 47 id. 512.)

We think, however, that the power of disposition given to the widow was not intended to be absolute and unconditional, but was limited by the language devising the property, for her use and enjoyment during her life, and did not give her the power of disposing of it by will. This limitation, therefore, operated as a restraint upon the power of alienation, and prevented the estate devised to her, from being defined as an absolute estate in fee.

The devises, therefore, to Mary Griffin and her children were not in any sense repugnant to the prior estate, and may be sustained as valid executory devises. Authorities *supra.* The effect of these conclusions is to destroy the basis upon which the surrogate proceeded in imposing the tax and justified the reversal of his order. While it is possible that the legatees may eventually take a valuable estate, under the will of William Cager, that event, being contingent upon the non-exercise by his widow of the power of disposition, renders the present appraisable value of such interest incapable of any correct or reasonably approximate valuation. When the present value of property, which is devised to one with a limitation over to others, upon the happening of some event which may or may not occur, can be ascertained, then a ground upon which an approximate estimate of the value of the ultimate devise appears, and it may be made; but when the question as to whether any property at all shall pass under the limitation over, and, if so, how much, depends upon the will of the first taker, we are unable to see any rule by which such value can be determined.

In the case first mentioned, the act enables a tax to be imposed

and collected upon the ulterior devisees, through the medium of a bond to be given by the respective legatees, payable when they come into the possession of the devised property. § 2 chap. 483, Laws of 1885. In the latter case, however, there is no basis upon which the value of the devise can be appraised, and no foundation for the imposition of any tax and the provision for the giving of a conditional bond is, therefore, wholly inapplicable.

Whether an appraisal of the value of these devises, for the purpose of taxation, may be made when they eventually come to the possession of the devisees, we are not called upon now to determine. It may be that the tax will be altogether lost to the State if an appraisal is not now allowed; but if so, the fault lies in the act itself and not in the construction which its language requires to be put upon it.

The order of the General Term should, therefore, be affirmed.

All concur.

Order affirmed.

Where the amount of the legacy is fixed the transfer is taxable even if the legatee is contingent, Matter of Vanderbilt, 172 N. Y. 69. But the life estate and remainder are separate and neither is to be affected by the tax on the other. Commonwealth's Appeal, 127 Pa. St. 435.

It has been held under some statutes that a remainder is not taxable until the death of the life tenant. Nieman's Estate 131 Pa. St. 341; Vanderbilt v. Eidman, 196 U. S. 480.

MYGATT V. WASHBURN.

Court of Appeals of New York. June 1857.
15 New York, 316.

Denio, C. J. The act relating to the assessment of taxes requires that every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him. (1 R. S., 389, § 5.) As the plaintiff resided in Oxford, during a portion of the year of 1846, and changed his residence to Oswego while the procedings to make out the assessment for that year were going on, it becomes necessary to ascertain when, in the course of these proceedings, the assessment shall be said to be made. . . . . . In my opinion the assessment should be considered as made at the expiration of the time limited for making the inquiry, namely, on the first day of July. If there is any change, of residence or in the ownership of the property, after that day, it

does not affect the assessment roll. The inquiries are then completed. Any changes which the assessors are authorized to make after that time, are such as may be required to correct mistakes. No earlier day can be assumed, because what is done by one or all the assessors prior to the first of July is inchoate and preparatory, and liable to be altered according to their final judgment on the matter. When the statute speaks of the time "when the assessment is made" it refers to the binding and conclusive act which designates the tax payers and the amount of taxable property. If I am correct in what has been said, it follows that the time, referred to in the statute, is the first day of July. It cannot be an earlier or a later day without involving incongruities which we cannot suppose the legislature would have permitted to exist. . . . . .

The plaintiff, therefore, was not subject to the jurisdiction of the assessors. In placing his name on the roll, and adding thereto an amount as the value of his personal property, they acted without authority. As the board of supervisors was obliged by law to annex a tax to the name of every person assessed upon the roll, and to issue a warrant for the collection of the tax, the unauthorized act of the assessors was the means by which the property of the plaintiff was procured to be sold. They are, therefore, responsible to the plaintiff for the damages which ensued. It was not, in the view of the law, the case of an error of judgment. It is a salutary rule, though in some cases, and perhaps in the one before us, it may operate harshly, that a subordinate officer is bound to see that he acts within the scope of the authority legally committed to him. The principle is too well settled to require a reference to authority; but its application to the case of assessment of a person not liable to taxation in the town or district in which the assessment is made has often been declared in the courts of this and other states. (*Suydam* v. *Keys*, 13 John., 444; *Prosser* v. *Secor*, 5 Barb., 607; *People* v. *The Supervisors of Chenango County*, 1 Kern, 573; *Freeman* v. *Kenney*, 15 Pick., 44; *Lyman* v. *Fiske*, 17 id., 231.)

. . . .

The judgment of the Supreme Court should be affirmed.

All the judges concurred in affirming the judgment, except SHANKLAND, J., who dissented.

Judgment affirmed.

95 Cal 300

PEOPLE EX REL. CHAMBERLAIN V. FORREST.

Court of Appeals of New York. October, 1884.
96 New York, 544.

Appeal from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made June 23, 1883, which affirmed a judgment of Special Term, reducing an assessment made upon the relator as trustee, etc.

This was a proceeding by a *certiorari* under and pursuant to chapter 269, Laws of 1880.

FINCH, J. We need not at present deny that assessors, after the completion of their roll and during the statutory notice of twenty days preceding the final hearing and review, may correct a mere clerical error, apparent upon the face of the roll, and which the parties interested, by mere inspection, could see was such. Thus, a mistake in the footing of several separate items, obvious to any one examining the computation, might, perhaps, be corrected in the manner adopted by the defendants in the present case. But we must go much further than that in order to sustain the appeal of the assessors. It has been decided, and is not now disputed, that after the completion of the roll, and the formal notice of that completion, assessors are without jurisdiction to change either the persons or property assessed, or the adjudged valuation of the latter, except upon complaint of the party aggrieved. (*Clark* v. *Norton,* 49 N. Y. 248; *Westfall* v. *Preston,* id. 352; *Overing* v. *Foote,* 65 id. 263.) The relator as trustee was intended to be assessed upon personal property in his hands to the amount of $40,000. The assessors agreed upon that amount as the correct valuation, but they, or some one of them, entered it on the roll at $4,000. Before the notice was given of the completion of the roll, and while change or correction was entirely within their power, they discovered the fact of the mistaken entry. With this actual knowledge, they failed to make the change which duty required and opportunity permitted, but negligently allowed the error to remain until they themselves certified that the roll was complete and open for inspection. The notice to that effect was given on the 25th day of July, 1882, and no change in the entry was made until after August 2, 1882. After that and before the review day one of the assessors changed the $4,000 to $40,000. So far as appears, he did this at the time, without notice to the relator, or even to his associates, although the latter afterward approved and ratified his act. And

thus matters stood until the review day arrived, and then for the first time notice was given to the relator of the change which had been made. He demanded to have the assessment stricken out or restored to the original amount, $4,000, which was denied. By this process he was deprived utterly of the twenty days notice which the statute allowed him. To sustain the assessment might operate in this wise. Immediately upon the completion of the roll and publication of the fact, a tax payer examines it and finds himself assessed for $1,000 of personal property and is content. He, therefore, does not appear on the review day, but finds later that during the running of the notice the assessors had added a cipher and increased his liability ten times. If it be said in such case that he should have had notice of the change, then what warrant is there for narrowing that notice to one day when the statute awards twenty. Even a clerical error, if it affects substantial rights of a party, is not corrected by the courts without notice to him, and that for such full and regular period as the law prescribes. Here the relator had no notice of the actual assessment charged against him until the review day arrived. The effect upon him was the same as if the change had been purposely made with a view of taking him by surprise and giving him the least possible notice. The ground now taken is that the change was but the correction of a clerical error. It was much more than that, for it concerned the very substance and extent of the assessment. What may properly be considered a mere clerical error under the assessment laws was determined in *Matter of Hermance et al.*, (71 N. Y. 485). Under the act of 1869 the boards of supervisors, on the recommendation of the County Court, were authorized "to correct any manifest, clerical, or other error in any assessments," etc. After discussing the word "manifest" the court said: "Clerical errors are mentioned to distinguish them from, and exclude errors of substance, of judgment, or of law;" and these latter were further described as "errors affecting the merits of the assessment" and not mere errors of form. The error here, if clerical in its origin, was one which affected the substance of the assessment, and when discovered by the assessors before the completion of the roll, and still suffered to remain, became an error of pure negligence. Shall they be permitted to plead that as a sufficient reason for depriving the tax payer of the full notice which the law gives him and which is his right? That the change may have been a just one on its merits does not alter the case. That question is not here. Possibly and almost probably, every other assessment upon the same roll might have been in-

creased during the running of the notice without compelling any one to pay a tax on what he did not have. That fact would neither justify nor excuse the unauthorized action. The assessors speak to the tax payers through their completed rolls. Those, and those only, register their judgments. What the property-owner there finds he has a right to rely upon as in truth the judgment and determination of the officers. If they may change it, with little or no notice, to correspond with some unregistered judgment and opinion known only to themselves, and so as not merely to correct a formal or non-substantial error but so as to increase valuations and add to liabilities there will be little of safety to the tax payer or of utility in the rights which the statute confers.

We are of opinion that the case was properly decided and that the judgment should be affirmed.

All concur.

Judgment affirmed.

COMMONWEALTH V. FREEDLEY'S EXECUTORS.

Supreme Court of Pennsylvania. 1853.
21 Pennsylvania State 33.

WOODWARD J. The Acts of the Assembly of 7th of April, 1826, and 22nd April, 1846, relating to collateral inheritance taxes, assess the tax at a fixed rate on the *"clear value"* of the estates described in the acts. But how shall the clear value of the estate be ascertained? The legislature undertook to answer this question by the 12th section of the Act of April 10, 1849, entitled an Act to create a Sinking Fund, &c.

As amended by the 10th section of the Act of 11th March, 1850, relating to collateral inheritance taxes, this 12th section requires the Register to appoint an appraiser as often, and whenever occasion may require, for three purposes: 1st. To put a fair valuation on the real estate subject to the tax. 2d. To make a fair and conscionable appraisement of the personal estate. 3d. To assess and fix the then cash value of all annuities and life estates, growing out of said estate. From this appraisement and assessment any person, dissatisfied therewith, has a right to appeal to the Register's Court, within thirty days, on paying or giving security for costs and taxes.

That the assessment of the appraiser is to be final, if not appealed from, is shown by the act declaring that it is made "to fix

the valuation of the real estate"—that the appraisement of the personal estate is to be fair and conscionable, and that the tax on annuities, and life estates, is to be "immediately payable out of the estate at the rate of said valuation." But the property subject to the tax may be fraudulently concealed, accidently overlooked, or may not be known to the representatives of the decedent at the time of the appraisement, and, therefore, the Register is to appoint an appraiser "as often as, and whenever occasion may require." Whenever portions of the estate come to light after the first appraisement, they are to be appraised in the same manner, but as to such portions as were the subject of appraisement, the "clear value" is fixed, and the law assesses the tax of five per cent. Like the assessment of taxes for state and county purposes, the property subjected is, first, to be found, then valued and appraised, and then taxed; but, instead of officers assessing a rate of taxes on the ascertained property, and valuation according to the public necessities, the law, in this instance, assesses a fixed rate.

Such is the system provided for collateral inheritance taxation, and it does not admit of opening, to take in additions to the clear value of property once assessed. That property is vested in the heir or devisee. If it appreciates, after it comes to him, it is his good luck,—if it depreciates, it is his misfortune; but, as the state would not submit to a reassessment for the purpose of diminishing her tax in the event of a subsequent depreciation, she is not entitled to a reassessment for the purpose of increasing it by reason of an advance in the market value of the estate, after an assessment by officers of her own appointment, with the right of appeal. The Commonwealth is as much subject to the rules of equity and justice, as her citizens. She possesses the taxing power, but when it has been fairly applied, according to her own dictation, it is spent and gone. Having taken five per cent. of the decedent's estate, according to its clear value, as fixed and conscionably appraised, she cannot return at intervals to take from the new owners five per cent. of what their skill and industry, or good luck, may have added to its value. If she may, when are such returns to cease? And at what intervals are they to occur? How long and how often are heirs and devisees to be subject to such visitations? The law has prescribed no rule for tortures of this sort, and, therefore, they may not be inflicted.

The judgment is affirmed.

For the power of the legislature to provide for a reassessment see note to Matter of McPherson, 104 N. Y. 306, *supra*.

II. Tax Domicil.

BORELAND V. BOSTON.

Supreme Judicial Court of Massachusetts. January, 1882.
132 Massachusetts, 89.

Contract to recover the amount of a tax assessed by the defendant city upon the poll and personal property of the plaintiff, on May 1, 1877, and alleged to have been paid by him under a protest in writing. At the trial in the superior court, before *Aldrich*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

The case was argued at the bar in November, 1880; and was afterwards submitted on briefs to all the judges.

Lord, J.

. . . .

The other question raised is upon the correctness of the instructions of the presiding judge upon the question of domicil.

The evidence tended to show that the plaintiff was born in Boston in 1824, and had lived there until June 1876, when he sailed for Europe with his family. He testifies that when he left Boston he had definitely formed the intention of not returning to Boston as a resident; that in the fall of 1876 he had decided to make Waterford, Connecticut, his residence, and then formed the intention of purchasing land there, which he bought on May 28, 1877; and that he remained in Europe until 1879, when he returned to this country, and went to Waterford. On this evidence, the judge instructed the jury, "that a citizen by the laws of this Commonwealth must have a home or domicil somewhere on the first day of May for the purpose of taxation; that in order to change such home or domicil, once acquired, and acquire a new one, the intention to make the change and the fact must concur; that if the plaintiff with no definite plan as to the length of time he should remain abroad, and no definite purpose about a change of domicil, went to Europe with his family, that would not effect a change of his domicil from Boston, and he would remain liable to taxation there; but that if he left Boston in 1876 with his family to reside in Europe for an indefinite length of time, with the fixed purpose never to return to Boston again as a place of residence, and with the fixed purpose of making some place other than Boston his residence whenever he should return to the United States, and had in

his mind fixed upon such place of residence before May 1, 1877, and remained in Europe until after that time, he was not liable to this tax as an inhabitant of Boston on the first of May of that year; that whether he had done enough to make Waterford his home or not, was not essential in this case,—if he had lost his home in or ceased to be an inhabitant of Boston at the time, he was not taxable there."

. . . .

There are certain words which have fixed and definite significations. "Domicil" is one such word; and for the ordinary purposes of citizenship, there are rules of general, if not universal acceptation, applicable to it. "Citizenship," "habitancy" and "residence" are severally words which may in the particular case mean precisely the same as "domicil," but very frequently they may have other and inconsistent meanings; and while in one use of language the expressions a change of domicil, of citizenship, of inhabitancy, of residence, are necessarily identical or synonymous, in a different use of language they import different ideas. The statutes of this Commonwealth render liable to taxation in a particular municipality those who are inhabitants of that municipality on the first day of May of that year. Gen. Sts. c. 11, §§ 6, 12. It becomes important, therefore, to determine who are inhabitants, and what constitutes inhabitancy.

. . . .

We cannot construe the statute to mean anything else than "being domiciled in." A man need not be a resident anywhere. He must have a domicil. He cannot abandon, surrender or lose his domicil, until another is acquired. A cosmopolite, or a wanderer up and down the earth, has no residence, though he must have a domicil. It surely was not the purpose of the Legislature to allow a man to abandon his home, go into another State, and then return to this Commonwealth, reside in different towns, board in different houses, public or private, with no intention of making any place a place of residence or home, and thus avoid taxation. Such a construction of the law would create at once a large migratory population.

. . . .

If it should be deemed sound to hold that a person, who, before the first day of May, with an intention in good faith to leave this State as a residence and to adopt as his home or domicil another place, is in good faith and with reasonable diligence pursuing his way to that place, is not taxable here upon the first of May, the

doctrine should be limited strictly to cases falling within these facts.

. . . .

We think, however, that the sounder and wiser rule is to make taxation dependent upon domicil. Perhaps the most important reason for this rule is, that it makes the standard certain. Another reason is, that it is according to the general views and traditions of our people.

. . . .

We have said that we prefer the test of domicil, because of its certainty and because of its conformity to the views and traditions of our people, and, we may add, more in accordance with the various adjudications upon the subject in this State, and more in accord with the general legal and judicial current of thought. It is true, that, as said by Mr. Justice Metcalf, "it has repeatedly been said by this and other courts, that the terms 'domicil,' 'inhabitancy' and 'residence' have not precisely the same meaning." But it will be found upon examination that these three words are often used as substantially signifying the same thing.

. . . .

Upon the whole, therefore, we can have no doubt that the word "inhabitant" as used in our statutes when referring to liability to taxation, by an overwhelming preponderance of authority, means, "one domiciled." While there must be inherent difficulties in the decisiveness of proofs of domicil, the test itself is a certain one; and inasmuch as every person by universal accord must have a domicil, either of birth or acquired, and can have but one, in the present state of society it would seem that not only would less wrong be done, but less inconvenience would be experienced, by making domicil the test of liability to taxation, than by the attempt to fix some other necessarily more doubtful criterion.

. . . .

The plaintiff does not bring himself within this rule; for although he might have left the Commonwealth with the fixed purpose to abandon it as a residence, he did not leave it on his way to a place certain which he had determined upon as his future residence, and was proceeding to with due despatch; and, upon the general rule that, having had a domicil in this Commonwealth, he remains an inhabitant for the purpose of taxation until he has acquired a new domicil, the intention and fact had not concurred at the time when this tax was assessed. The instructions of the pre-

siding judge, therefore, inasmuch as they were not based upon the rules here laid down, were not accurately fitted to the facts of the case, and the

Exceptions must be sustained.

PENNSYLVANIA V. RAVENEL.

Supreme Court of the United States. December, 1858.
21 Howard 104.

Mr. Justice Nelson delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the eastern district of Pennsylvania.

The action was brought by the State of Pennsylvania against the defendant, executor of the late Mrs. Kohne, to recover the sum of $5,820.23, called a collateral-inheritance tax, assessed upon the personal estate of the testatrix. By the law of Pennsylvania, where the property of the deceased passes to his or her collateral heirs, or to strangers, either by the law concerning intestate estates, or by will, it is made subject to a specific taxation for the benefit of the State. This tax is five per centum on the clear value of the estate. (Brightly's Purdon, p. 138; act 22d April, 1846, sec. 14.) And according to the construction of these acts imposing the tax, it is held, if a decedent be domiciled in the State at the time of his or her death, stocks of other States, or of corporations of other States, and debts due in other States, in the hands of the executors or administrators, are liable to this tax. (4 Harris's Rep., 63; 18 Howard's Rep.)

But if the domicil of the deceased be not in Pennsylvania, then the estate is not subject to the tax.

Mrs. Kohne died in the city of Philadelphia in March, 1852, and the question in the court below was, whether or not she was domiciled in Pennsylvania at the time of her death, or in the State of South Carolina. The jury, under the charge of the court, found a verdict for the defendant.

The case is before us on four exceptions taken to the charge of the court.

The first three it is not material to notice. . . . . .

The fourth exception is, that the court, in the charge, (For charge see *infra*) took the fact of domicil from the jury.

This exception, we think, is founded in a misapprehension of the instructions given. The court, after stating to the jury that the question of domicil was one of mixed law and fact, observed, that it was for the court to instruct them what constituted a domicil, and for the jury to apply the principles of law governing it to the facts as found by them; that the jury had no right to disregard the law as laid down by the court, and the court had no right to dictate to them as respected the facts, which they must find on their own responsibility. The court then stated to the jury the principles of law applicable to the question of domicil, to which no exception has been taken. Also, that as it had been admitted Mr. Kohne, the husband, who died in Philadelphia in 1829, had his domicil in Pennsylvania at the time of his death, the domicil of the wife must be taken as in that State at the time, and submitted the question whether or not she had since changed it to the State of South Carolina; and then, after referring to the leading facts given in evidence, and relied on to establish a change of domicil, observed, that if the jury believed this evidence, the domicil of Mrs. Kohne was in South Carolina.

The court further say, that the mere speaking of a place as a home, without any act showing an intention to return to it, would amount to nothing. But if acts and the language concur, as proved by the witnesses in the case, it would be a denial to the deceased of the right to choose her own domicil, not to allow her acts and declarations, continued for many years, to be conclusive of the fact.

We perceive nothing in the instructions of the court, or in the view of the case as presented to the jury, by which the question of domicil, so far as it depended upon the facts, was taken from the jury. The evidence was very strong in support of a change of domicil by Mrs. Kohne after the death of her husband, and, if believed by the jury, it was not too much to say, as matter of law, that they should find for the defendant.

The judgment of the court below is affirmed.

Mr. Justice DANIEL, dissenting (stating charge to jury below):

"If the jury find, that after his death [the death of the husband] she [Mrs. Kohne] returned to her former domicil in Charleston, took possession of the house and servants devised to her, lived in that house six or seven months of every year, calling it her home, spending only a few weeks in the spring and fall in her house here, and the remainder of the summer at watering-places; coming north in the summer for the sake of her health, always intending to return to her house in Charleston; that she was hin-

dered returning the last time from sickness; if she consulted counsel how she might avoid giving any pretence to the tax-gatherers of Pennsylvania to treat her as domiciled here; if she carefully denied at all times her citizenship in Philadelphia, even to erasing it from printed lists of her church donations, as the assertion of a falsehood; if she refused to have some of her furniture removed here, for fear such a fact would be siezed upon, after her death, for the purpose of asserting her domicil here; if she called herself, in her will, 'of Charleston;' if, when absent from that place, she always spoke of returning to it as her home, and did return to it as such, till hindered by sickness—if the jury believed this evidence of defendant's witnesses, testimony which has not been contradicted or denied, it would be absurd to say her domicil was not where she asserted it to be, to wit, in the city of Charleston."

BELL V. PIERCE.

Commission of Appeals of New York. May, 1872.
51 New York, 12.

About the 20th of June, 1864, plaintiff's family went to the house in West Seneca, and remained there, as in previous years, for about three months, and then returned to the house in Buffalo; and during the summer season, plaintiff was with his family in West Seneca, or at his house in Buffalo, substantially as is stated to have been his habit in previous years. Defendants had no knowledge, before the delivery of the assessment roll to the supervisors of the town, that the plaintiff had or claimed to have any residence except in West Seneca, although they knew that he had been residing during that year in Buffalo, and that his family had come to West Seneca only a few weeks previous to July 1, 1864. They gave the statutory notices of the completion of the assessment roll, and of their meetings to correct the same, and no one appeared before them to object to the regularity of the plaintiff's assessment. Plaintiff was not assessed for personal property in the city of Buffalo in the year 1864. Upon trial at Circuit, the court directed a verdict for the plaintiff, subject to the opinion of the court at General Term. A verdict was rendered accordingly.

The conclusions of law at General Term were as follows:

That the defendants, as assessors as aforesaid, had jurisdiction to determine whether the plaintiff was taxable in said town of West

Seneca, for personal property, at the time they prepared said assessment roll, in 1864, and that their determination on that subject is conclusive.

That both of said taxes were legally assessed against the plaintiff.

That the plaintiff cannot maintain this action, but the defendants should have judgment on the verdict.

And judgment was directed and entered accordingly.

HUNT, C. If the General Term was right in holding that the defendants, as assessors, had jurisdiction to determine whether the plaintiff was an inhabitant of West Seneca, taxable for personal property in that town, its judgment was correct. If in error on that point, its judgment was wrong. In *Barhyte* v. *Shepard,* this court held that the assessors had jurisdiction to determine whether the plaintiff's property was entitled to exemption for the reason that he was a clergyman. (35 N. Y. 238.) In *Chegary* v. *Jenkins,* this court held that the assessors had jurisdiction to determine whether the property sought to be exempt as a seminary of learning was entitled to that exemption. (5 N. Y. 376.) . . . . .

In each of these cases the assessors had jurisdiction of the person alleged to be taxable, and of the property on which the assessment was sought to be imposed. Barhyte, for example, was a resident of the town of Spencer. In that town were located both the real and personal estate, respecting which the question arose. He was undoubtedly a taxable inhabitant, that is, one of a class liable to taxation under proper circumstances. So was Madame Chegary a taxable inhabitant of New York. The persons being taxable inhabitants, and the property in each case being before the assessors, it was their duty to decide whether it came within the exemptions provided by law. The parties making complaint themselves submitted that very question to the assessors. It was their duty to decide it as they understood the law to be. In *Mygatt* v. *Washburn,* (15 N. Y. 316), on the other hand, the assessors had no jurisdiction of the person of the plaintiff. He was not a taxable inhabitant, that is, he was not liable to taxation for personal property in the town of Oxford, under any circumstances. The assessors, therefore, had no power to adjudicate upon the question of his taxability, and when they undertook to do so their action was void, and did not protect them from liability.

Under the Revised Statutes the rule is as follows, viz: "Every person shall be assessed in the town or ward where he resides, when the assessment is made, for all the personal estate owned by him." (1 R. S. 390, § 5.) But one assessment can be made upon an in-

dividual for personal estate, and that must be in the town or ward where he resides when the assessment is made. In the year 1850 (Laws 1850, chap. 92, p. 142), it was enacted, "that in case any person possessed of such personal estate shall reside during any year in which taxes may be levied, in two or more counties, towns or wards, his residence, for the purposes and within the meaning of this section (§ 5, *supra*), shall be deemed and held to be in the town, county or ward in which his principal business shall have been transacted." (1 R. S,. Edm. ed., 362.)

A new test to determine the fact of residence, which was before unknown, was created by this law. By the fact as ascertained in this mode, to wit, the place of business, was the liability to taxation determined. The statute assumes that a man may have more than one place of residence at the same time. The liability to taxation for personal property is fixed by the residence on the first day of July in each year. *Mygatt* v. *Washburn, supra.* No person can be assessed as a taxable inhabitant of Seneca unless on that day he was a resident of that town. On that day the plaintiff had, with his family, occupied his own house in that town for ten days. His family remained there for three months continuously, the plaintiff taking a portion of his meals there every day and spending there five or six nights of each week. He attended daily to his business in Buffalo, taking a portion of his meals at his house there, sleeping there one or two nights of each week, his wife occasionally taking meals at the house with him. The plaintiff, upon this state of facts, was no doubt a voter in Buffalo, and was there liable to military and jury duty. He was a resident of Buffalo, having his domicile in that city. The cases also show that he was at the same time a resident of West Seneca. To establish a residence, requires a less permanent abode than to give a domicile, or even to create an inhabitance. (*Harvard* v. *Gore,* 5 Pick. 379; *Guire* v. *O'Daniel,* 1 Binny 349; *Haggart* v. *Morgan,* 1 Seld. 422.)

. . . .

The books are full of cases defining residence and non-residence under the statutes, subjecting non-residents to arrest and their property to attachment. It would be difficult to reconcile these cases. I do not find any well considered cases where the question has arisen upon the statute providing for the taxation of personal property, other than those I have referred to. I conclude, therefore, that the plaintiff, on the first day of July, 1864, was, for the purpose of taxation, a resident of the town of West Seneca. Being a resident of that town, and having personal property liable to taxation, the

assessors had jurisdiction to include that property in the assessment roll of that town. The case comes within the principle of *Barhytc* v. *Shepard, supra,* and not within that of *Mygatt* v. *Washburn,* where the assessors had no jurisdiction of the person of the plaintiff, and no right to take any action on the subject. Where the principal business of the plaintiff was transacted was a matter of fact, to be ascertained by proof and to be settled by judicial determination. This determination was to be made by the assessors. It was made upon proof presented, or, if none was presented, by the best means of knowledge possessed by them. They are not liable for an erroneous decision of a question which they had jurisdiction to decide.

The judgment should be affirmed with costs.

. . . .

Judgment affirmed.

Earl and Gray, C. C., dissenting.

III. Liability of Corporations.

MIDDLETOWN FERRY CO. V. TOWN OF MIDDLETOWN.

Supreme Court of Errors of Connecticut, April, 1873.
40 Connecticut, 65.

Park, J. The statute in relation to the assessment and collection of taxes, (Gen. Statutes, page 710,) provides that the personal property of certain corporations shall be assessed and set in the list of the towns in which such corporations have their principal place of business or exercise their corporate powers. The plaintiffs' corporation comes within this provision of the statute, and the plaintiffs claim, and the court has found, that during the time covered by the plaintiffs' declaration they had their principal place of business and exercised their corporate powers in the town of Portland.

This finding of the court would seem to decide the case in favor of the plaintiffs, unless it can be said, as a matter of law, that the principal place of business of a corporation, or where it exercises its corporate powers, is where the business of the corporation is being carried on by its servants and agents, who perform such duties as the corporation requires of them.

It appears in the case that the town of Middletown extends to

the east side of the Connecticut River, and that consequently the ferry boats of the plaintiffs, in plying back and forth from the east to the west shore of the river in the performance of the business of the plaintiffs, are all the time within the limits of the defendant town; and hence the defendants claim that, during the time in question, the principal place of the business of the plaintiffs, or where they exercise their corporate powers was upon their ferry boats on the river, although the court had found that, previous to the time in question, the stockholders of the plaintiffs' corporation, in legal meeting, duly warned and held, voted, in good faith, to change its place of business from the town of Middletown to the town of Portland, where four-fifths of the stock of the corporation was owned and held, and where a majority of the directors resided; and although all the regular and special meetings of the corporation and of the directors have ever since been there held, and all the books and papers of the corporation, except such as have been in daily use in carrying on the business of the corporation, have been there deposited.

We think it is clear that the principal place of the business of a corporation, or where it exercises its corporate powers, within the meaning of the statute, is where the governing power of the corporation is exercised; where those meet in council who have a right to control its affairs and prescribe what policy of the corporation shall be pursued, and not where the labor is performed in executing the requirements of the corporation in transacting its business. It may be true in the sense of *"qui facit per alium facit per se,"* that a corporation may be said to exercise its corporate powers wherever its business is being transacted, but in this statute the expression is used in a stricter sense. It has reference to what is done directly by the corporation itself in the management of its affairs, and not to what is done by others in obedience to its requirements. We think this claim of the defendants is untenable.

. . . .

Again, it is claimed that the plaintiffs had no right under their charter to change their principal place of business, or the place where they had exercised their corporate powers; that this place having once been established by the charter in the town of Middletown, it must there remain, and that it did consequently remain there during the years in which the assessments of the plaintiffs were made. But we discover nothing in the charter which sustains this claim. Nothing in it has been pointed out, except some expressions from which a slight inference might be drawn that it was

expected that the corporation would remain a Middletown corporation, but this is not sufficient to make void the acts of the corporation in removing its principal place of business from the town of Middletown to the town of Portland, when the statute seems to contemplate that such corporations will change their principal place of business, or the place where they exercise their corporate powers, as occasion may require. If it were not so it would have declared that such corporations should be taxed in the towns where they first had their corporate existence

There is no error in the judgment complained of.

In this opinion the other judges concurred.

Foreign corporations acquire the domicil of their manager. Dubuque v. Illinois Central R. R. Co. 39 Iowa 83. Thus, if a foreign insurance company deposits bonds with a state officer at the state capital, it is to be taxed on these bonds, not at the state capital but at the domicil of its managing agent. Life Ins. Co. v. Commissioners, 31 N. Y. 32. But choses in action owned by a foreign corporation may be taxed, if the statute so provides where they are situated. Savings etc., Society v. Multnomah Co., 169 U. S. 421 *supra*.

WESTERN TRANSPORTATION CO. V. SCHEU ET AL.

Court of Appeals of New York. June, 1859.
19 New York, 408.

Appeal from the Supreme Court. The action was for the purpose of determining where the plaintiff, a corporation having a capital stock of $900,000, was taxable. It had been assessed for such capital in the town of Wheatfield, Niagara county, and the complaint admitted its liability to such assessment. It had also been assessed in the eighth ward of the city of Buffalo, and the defendants, Scheu and Reynolds (the respondents) were officers of that city, the former of whom had issued, and the latter was proceeding to enforce, a warrant for the collection of the tax. The trial was before Mr. Justice Davis, without jury, and he ordered judgment, restraining Scheu and Reynolds from collecting the Buffalo assessment. Upon appeal, this judgment was affirmed at general term in the eighth district, and the defendants appealed to this court.

Selden, J. It was stated upon the argument that the sole object of this suit was, to have it judicially determined whether the plaintiffs are liable to taxation in the city of Buffalo; and any technical imperfections in the pleadings or proceedings were expressly waived,

with a view to the decision of this single question. The general law of the State on the subject of the assessment and collection of taxes (1 R. S., 389, § 6), provides, that "all the personal estate of every incorporated company, liable to taxation on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be."

The plaintiff is a corporation organized under the act of April 15, 1854, for the incorporation of companies to navigate the lakes, &c. (*Sess. Laws,* 1854, 218), the first section of which provides, that any five or more persons may form a company, by making a certificate in writing, and filing the same "in the office of the clerk of the county in which the principal office for the management of the business of the company shall be situated," in which certificate they are required to state, among other things, "the name of the city or town and county in which the principal office for managing the affairs of such company is to be situated."

The certificate filed by the plaintiff, pursuant to this act, bearing date of December 28, 1855, in addition to other statements required by the statute, contains the following, viz: "The principal office for managing the financial and other affairs of such company shall be located and situated at the village of Tonawanda, in the town of Wheatfield, county of Niagara, which is hereby declared to be the village, town and county where the principal office for managing the affairs of such company shall be situated." This certificate was filed on or about the day of its date in the office of the clerk of the county of Niagara.

It was proved upon the trial that the company, shortly after its organization, established and had ever since maintained an office at the village of Tonawanda, where the stock book of the company was kept, and where the directors held their regular monthly meetings; but at which very little other business was transacted. Only one clerk was employed at this office, at a salary of $150 per annum. It also appeared that the business of the company, consisting of the transportation of produce and other property upon the Western Lakes and the Erie Canal, was very large; that twenty clerks were employed at the office of the company in Buffalo; that the president, secretary and treasurer of the company resided there, and did their business chiefly at that office; that the business done there annually amounted to several hundred thousand dollars; that full books of account of the business of the company were kept there; that money received at places west of Buffalo, after paying necessary disbursements, were remitted to the office at Buffalo; that the

company had a large number of offices both East and West, at all of which, except New York and Chicago, the business was much less than at Buffalo; that more money was received at Chicago, and about twice as much at New York, as at Buffalo. It was shown also that the object of the company, in locating its principal office at Tonawanda, was to avoid taxation in the city of Buffalo.

Under these circumstances it is evident, that unless the certificate filed pursuant to the statute, is conclusive upon the question of location—if the matter is open to parol proof at all, it is established beyond controversy, that the principal office "for transacting the financial concerns of the company" is not at Tonawanda, but either at New York or Buffalo; probably the latter. The only question then is, in regard to the effect as evidence, of the statement in the certificate. There are some considerations which seem to me decisive of this question. Unless the Legislature intended that the certificate should be conclusive, as to the location of the principal office, it is difficult to see any adequate motive for requiring the statement to be made. It is in no manner essential to the existence of a corporation that the place of its principal office should be fixed, or even that it should have any such office. We can, however, see obvious reasons why it is expedient that corporations should be deemed to have a location for certain purposes, among which is that of taxation; and that this should be definite and certain, and not subject to fluctuation or doubt. When the question is left open to parol proof, serious difficulties and embarrassments must often arise. What makes the office of a corporation its principal office? Is it the residence of its officers? or does it depend upon the amount of the business done, or the number of clerks kept at a particular office? These and other like questions are of difficult solution where the question is left open and at large, and necessarily tend to produce controversies and litigation. To avoid disputes upon the subject was, I apprehend, one motive for requiring the location to be fixed by the certificate. It is not important that a corporation should be taxed where it does the greatest amount of its business; but it is important that the place where it is liable to be taxed should be known.

Another motive for the requirement in question, is shown by section 23 of the act of 1854, which requires the company to keep its stock books at the place designated in the certificate. This is for the convenience of the stockholders, and of persons dealing in the shares of the corporation. It is of very little consequence where such books are kept, whether where the other business of the com-

pany is principally done or not; it is only important that the place should be known and fixed.

Other considerations having the same tendency might be drawn from the various provisions of the act of 1854, and from cotemporaneous legislation; but these are sufficient, I think, to show that the object of the Legislature, in requiring these corporations to designate the location of their principal office in the certificate filed, must have been to produce that certainty on the subject, which could not otherwise be attained, and that the provision did not originate in any supposed necessity for having the "principal office" and the place of the principal business of the corporation identical.

The defendant's counsel seemed, upon the argument, to place much reliance upon the fact, that the motive of the company in placing its principal office at Tonawanda was to avoid taxation. But it is no more inequitable or immoral for a corporation to do this, than for an individual to do substantially the same. A person may keep his office in Buffalo and transact business there to an unlimited amount, enjoying all the facilities and advantages which the enterprise and expenditures of the city have afforded, and yet by residing without the city bounds avoid all municipal taxation. When this shall be practised, either by individuals or corporations, to an extent which renders it a serious evil, it will be for the Legislature to interfere.

The judgment of the Supreme Court should be affirmed.

All the judges concurring,

Judgment affirmed.

If the domicil of a corporation is fixed by its charter it may not be changed subsequently by the corporation by moving its business or property or conducting its business elsewhere. Oswego Starch Factory v. Dolloway 21 N. Y. 449.

PEOPLE EX REL PLATT V. WEMPLE, COMPTROLLER.

Court of Appeals of New York. November, 1889.
117 New York, 136.

DANFORTH, J. This case arises upon an application made by the relator, as president of the United States Express Company, for a *certiorari* requiring the comptroller of the state to return to the Supreme Court his proceedings relating to the imposition of a tax on the franchise or business of that company, to the end that such

proceedings might be set aside, and in the meantime the collection of the tax be stayed.

. . . .

The express company was composed of individuals who signed an agreement purporting to have been made April 22, 1854, but which, by its terms, was to take effect on the 1st day of May, 1854, and continue in force for ten years thereafter. On November 24, 1859, the articles were amended by the associates so as to continue in force for twenty years from the 1st of May, 1864, and on January 23, 1884, the directors, under power conferred upon them by the associates, passed a resolution continuing the existence of the company for twenty years from May 1, 1884. The association was formed for the purpose of carrying on a forwarding agency, banking, exchange and insurance business between such cities and towns of the United States, and those of other countries, as the directors, or their successors, might specify.

It is described in the articles as a "joint-stock company," its capital declared to be $500,000, divided into shares of $100 each, subject to increase or decrease, as the board of directors might think proper, but represented by certificates or scrip, signed by the president and secretary of the company, and countersigned by the treasurer. These shares are made assignable, without restriction, from one person to another, in the usual form, in person or by attorney, and may be forfeited by order of the directors for causes set forth in the agreement. The property and business of the company is to be managed by a board of directors, who, from their own number, might elect a president, vice-president and secretary, and, except by their permission, "no shareholder in" the company can use or sign its associate name; in short, into their hands the management of the whole business of the company is intrusted. The directors are also empowered to declare dividends from the net earnings of the company as they may from time to time deem expedient. Deeds and other instruments of conveyance, or as security, are to run to the president; and all suits at law or in equity in favor of the company are to be brought in his name. It is also provided that the death of no member or of any number of members less than a majority of the interest of the whole, shall operate as a dissolution of the company, but its business shall continue as if no death had occurred.

It seems obvious from these articles, that the arrangement consummated by them has little in common with a private partnership, for they provide for a permanent investment of capital, the right

of succession, the transfer of property by any assignment of the certificate of ownership, and the prosecution of suits in the name of one person. The company has, therefore, the characteristics of a corporation, and, so far as it can, it assumes to itself an independent personality, and asserts powers and claims privileges not possessed by individuals or partnerships.

. . . .

In view of the capacities and attributes with which, as we have seen, the United States Express Company is endowed, and in view, also, of the statutes which legalize its assumed capacities and make valid and effective its asserted right of succession, its distinctive name and the alienability of its shares, we find nothing to warrant the contention of the appellant that it is a mere partnership, existing only under its articles of agreement and association It is true those articles contain no reference to any statute of the State, as one under or by which the company was organized, yet, by the very constitution of the body itself and the privileges and powers which it can only exercise by virtue of those statutes, it must be taken to belong to one of those classes of artificial beings described in the act of 1880 as a "corporation, joint-stock company or association." The several persons composing it are made into a collective body and are given capacity in its name, and not their own, to take, grant, sue and be sued. Thus they are united, or organized, or incorporated. The death of a member causes no interruption, and the power of continued existence of this one body, and its organized or corporate action is derived from no inherent power of one or all of its members, but from the law, which sanctions the union. It is doing business within this state, and because it was also formed under the laws of the state it is within the act. Nor does it seem to us that this construction is at all at variance with the literal and precise language of the act. It declares (§ 3 of the act of 1880, as amended in 1881, chap. 36), "Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country, and doing business in this state (with certain exceptions not now material) shall be subject to, and pay a tax, as a tax, upon its corporate franchise or business into the treasury of this State annually, to be computed," according to certain specified circumstances, upon the capital stock or its valuation, made in accordance with the provisions of the first section of the act.

. . . . . The word "incorporated," as here used, is not to be

taken in a technical or restricted meaning and confined to an association brought into being according to the formula of a statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations of business the enabling provisions of the statutes.

In the case before us the agreement, which brought many persons into one artificial body, was so framed as to accomplish that end, and in proposing to conduct its affairs by the power given to it in the mode prescribed by the legislature, they must be deemed, for the purposes of the act in question, to be incorporated, that is, formed or united under the law of the state whether the artificial body be termed a corporation, a joint-stock company or association.

Nor is the principal question altogether new. In *Waterbury* v. *Merchants' Union Express Company* (50 Barb. 158) the nature and legal character of the defendant, a joint-stock association, created in like manner with the one before us, was held to have all the attributes of a corporation, and all its incidents except a common seal. The statutes from 1849 to 1867 were examined and held to confer the qualities which distinguish a corporation from a partnership, and to establish the relations of a member of the association as those of a stockholder in a corporation, and not those of an individual in a partnership, and that, in controversies affecting them, the analogies afforded by laws and jurisprudence in the case of corporations should be followed, and not those derived from a simple partnership. In *Westcott* v. *Fargo,* president of the same company (6 Lans. 319), a like discussion was had upon circumstances calling for a decision as to the nature and character of the association. A shareholder sued the company for the loss of freight intrusted to it. It was set up as a defense that the plaintiff, as such shareholder, was one of the owners of interest in the express company; but the court held otherwise—that it was no valid objection that the plaintiff was a member of that company—saying: "The action is against the corporation," and, so, the plaintiff prevailed. Upon appeal the case came to this court (61 N. Y. 542), and again the issue was distinctly presented. The appellant contended that the plaintiffs could not maintain an action upon a contract between themselves and the association of which they were members; that their remedy was in equity for an accounting as in partnership cases; while, for the respondent, it was argued that "joint-stock companies, organized under the statutes of the state are corporations, not partnerships." This court also examined the statutes relating to joint stock companies and came to the conclu-

sion that they conferred powers and privileges of corporations not possessed by individuals or partnerships.

. . . .

We, therefore, agree with the Supreme Court and think its order should be affirmed.

All concur; ANDREWS, J., in result.

Order affirmed.

See to the same effect Liverpool Ins. Co. v. Mass., 10 Wall. 566.

PEOPLE V. EQUITABLE TRUST COMPANY.

Court of Appeals of New York. June, 1884.
96 New York, 387.

Appeal from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made January 23, 1883, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial, without a jury.

EARL, J. This action was brought by the attorney-general against the defendant, a foreign corporation, to recover the sum of $1,575, which, it is claimed, the defendant should have paid into the treasury of the State within fifteen days from January 1, 1882, under section 2 of the act, chapter 542 of the Laws of 1880, as amended by chapter 361 of the Laws of 1881.

The defendant is a Connecticut corporation, and for many years did business through its officers in that State. Its business was the negotiating of loans on mortgages in the western states, or the purchase of obligations secured by mortgages in those States, and the selling of securities based on those loans and obligations. But during the year ending November 1, 1881, it did but little business and made but few loans, being engaged in caring for its old business of previous years, and looking after its real estate. During that time its sales of securities were very light, and were mostly made in foreign countries. During the eight years prior to the commencement of this action, it had an office for the transaction of business in the city of New York; but a very small portion of its property was in this State, and but little of its business was done here.

. . . .

The main contention on the part of the defendant is that there

is no constitutional authority for imposing the tax or enforcing its collection. It is, therefore, important first to determine the meaning of the act so far as it bears upon this case.

The act is entitled "An act to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations." Section 1 provides for the report as to dividends, and the appraisal of the capital stock of corporations in cases where no dividends have been declared or the dividends have been less than six per centum. Section 3, so far as it is now important, is as follows: "Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized by or under the laws of this State, or now or hereafter incorporated or organized by or under the laws of any other State or country, and doing business in this State, except savings banks and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufactures within this State, which exceptions shall not be taken to include gas companies or trust companies, shall be subject to and pay a tax, as a tax upon its corporate franchise or business, into the treasury of the State annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company or association, during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made or declared; or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of valuation of the said capital stock made in accordance with the provisions of the first section of this act."

. . . .

The defendant, being a foreign corporation, could not be taxed here in reference to its property situate out of this State, and its business not done here. Nor could it be taxed on account of its corporate franchise, as that was not given by our laws, was dependent upon the laws of the State of its creation, and had no existence separate therefrom. A corporation may, through its agents, extend its operations into other States, and thus, metaphorically speaking, go there; but it never really travels and its franchises exist only at the place of its domicile and residence. (*Plimpton* v. *Bigelow*, 93 N. Y. 592.)

So far as section 3 imposes a tax upon corporate franchises, its operation must, therefore, be confined to corporations created under our laws; and as to foreign corporations the tax is imposed solely upon business. The counsel for the appellant, however, claims that the tax is imposed upon all the business of such corporations, whether done in this State or elsewhere, and hence that this tax upon the business of this corporation, mostly done without the State, was wholly unauthorized. If the proper construction of this act requires us to hold that this tax was imposed upon all the business of this corporation it is, as I understand, conceded by the attorney-general that it cannot be enforced. We are of opinion that this was a tax imposed upon the business of this corporation done within this State.

. . . .

The legislature was dealing with the subject of taxing foreign corporations doing business in this State, and taxing them only because they did business in this State, and having the right to tax them only upon business done in this State. Under such circumstances, ... if there was nothing else in the statute to throw light upon the legislative intent, we would be obliged to hold that the word "business" had reference to business done within this State. But other parts of the statute make this plain. In the earlier part of the section the words "doing business in this State" are used, and when the word "business" is used later it has reference to the same business which was then in the legislative mind. Then the whole framework of the act shows that the legislature was conscious of the limitations upon its powers. Foreign insurance companies, and railroad and other transportation companies, were made liable to pay a tax, in plain terms, only upon business done in this State. It cannot be supposed that the legislature meant to tax some foreign corporations doing business in this State upon all their business done anywhere, and tax others only upon their business done in this State. There can be no reason for such discrimination, and it clearly was not intended.

. . . .

We have, therefore, reached the conclusion that this judgment should be affirmed.

All concur, except ANDREWS, J., not voting.

Judgment affirmed.

COMMONWEALTH V. N. Y., L. E. & W. R. CO.

Supreme Court of Pennsylvania. October, 1889.
129 Pennsylvania State, 463.

Opinion, Mr. Justice CLARK.

This case came into the Common Pleas of Dauphin county upon an appeal from a settlement made by the auditor general, etc., for state taxes on corporate loans, under the fourth section of the act of June 30, 1885, for the year 1887. It was tried by the court by agreement of the parties under the act of 1874. The learned judge of the court below found as matter of fact that $2,378,000 of the company's bonds were owned and possessed by residents of Pennsylvania, of which $852,000 were held by individuals, and the residue by corporations. The principal questions raised on this record are ruled by Commonwealth v. Delaware Div. Canal Co., 123 Pa., 594; Lehigh Valley R. Co. v. Commonwealth, and Commonwealth v. Lehigh Valley R. Co., the last two cases decided at this term and not yet reported (ante, 429). The only remaining question for our consideration is, whether or not the defendant company, being a foreign corporation is liable to be charged with State taxes at the rate of three mills on the dollar on their bonds held by individuals and firms resident within the state, as above stated.

The New York, Lake Erie and Western Railroad Company is a corporation of the state of New York. It was originally incorporated in the year 1832, as the New York & Erie Railroad Company, with power to construct a railroad from the city of New York to Lake Erie, through the southern counties of the state of New York. To avoid certain engineering difficulties, the company was afterwards authorized by the legislature of Pennsylvania, under certain restrictions to build a specific portion of its road through the counties of Pike and Susquehanna, in this state; acts of February 16, 1841, P. L. 28, and March 26, 1846, P. L. 179; the said company, by the act of 1846, being required to pay to the state of Pennsylvania, after the completion of the road, the sum of $10,000 annually. The property and franchises of the New York & Erie Railroad Company afterwards became vested in the Erie Railway Company, and, in 1878, in the New York, Lake Erie and Western Railroad Company. A portion of the defendant's road was made and is still maintained within the limits of this state, and since the completion and equipment of the road regular payment has been made by the company to the commonwealth of the said sum of $10,000 annually, pursu-

ant to the provisions of the several acts of assembly already referred to. Although a corporation of another state, and, therefore, a foreign corporation, the company is doing business in this state. By a certificate filed in the office of the secretary of the commonwealth, pursuant to the act of 22d April, 1874, the defendants have designated a place of business and an agent to represent them; they are, therefore, not only duly authorized but, in their operation of their road, they are actually engaged in doing business within the limits of this state.

The fourth section of the act of 1885 applies not only to all private corporations, created by and under the laws of this state or of the United States, but to such as are doing business in this commonwealth.

. . . .

The only question raised by the remaining assignments are, first, whether the provision of the fourth section of the act of 1885, so far as it applies to foreign corporations doing business in this state, is a proper exercise of legislative power; and, second, assuming this to be so, whether there is anything in the said provision by which the defendant road was permitted to pass through the counties of Pike and Susquehanna, which would exempt the company from the obligation of this act.

Upon the first question suggested, there can, we think, be but little room for discussion. In the Delaware Div. Canal Company case, already referred to, we said:

"Foreign corporations, exercising their franchises under the laws of other states and countries, are beyond the reach of our process of taxation. We could not require them ordinarily to comply with any such regulation of our law, and, therefore, they are necessarily excluded from the provisions of the act. Such foreign corporations as are engaged in business in the state might doubtless be required to comply as a condition of their right so to do, but this could only embarrass the action of the local assessor, and upon this ground, doubtless, they were wisely excluded from the operation of the act."

The last member of the concluding sentence of the paragraph quoted is a mere inadvertence. The fourth section of the act of 1885 does in terms embrace such foreign corporations as are engaged in business in this state, and the question now to be considered is, whether or not such a provision as respects the New York, Lake Eric & Western Railroad Company is a proper exercise of the legislative power of the state. The general statement that foreign corporations are ordinarily beyond the reach of our processes of taxation is un-

doubtedly correct, but when a foreign corporation comes into Pennsylvania and engages in business here, undoubtedly it does so subject itself to the general policy of, and the course of legislation in the state: Runyan v. Coster, 14 Pet. 122. A foreign corporation can exercise its franchises in Pennsylvania only in so far as it may be permitted by the local sovereign. The right rests wholly in the comity of the states: Paul v. Virginia, 8 Wall. 168. A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as the latter may think proper to impose: St. Clair v. Cox, 106 U. S., 350. These conditions will be valid and effectual, provided they are not repugnant to the constitution or laws of the United States, inconsistent with the jurisdictional authority of the state, or in conflict with the rule which forbids condemnation without opportunity for defense: Lafayette Insurance Co. v. French, 18 How. 404; Doyle v. Insurance Co., 94 U. S. 535; Pembina Mfg. Co. v. Pennsylvania, 125 U. S. 181.

It was competent for the legislature of Pennsylvania to impose as a condition upon foreign corporations doing business in this state that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within the state, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed and fixes a penalty for disregard of that duty. The legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon which corporations may do business within the state, and the corporation continuing its business subsequently would be taken to have assented thereto.

There is, however, a condition, implied even in the case of domestic corporations, that they will be subject to such reasonable regulations, in respect to the general conduct of their affairs, as the legislature may from time to time prescribe, and such as do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted: Chicago v. Needles, 113 U. S. 574. If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the legislature to do business within this state as a matter of grace and not of right? But it is said that the enforcement of the fourth section of the act of 1885 against the defendant corporation would impair the obligation of the contract existing between the commonwealth and the company, as set forth in the private statutes of 1841 and 1846 already referred

to. Apart from these statutes the defendant had the right by the comity of the states to contract and to sue within the state of Pennsylvania, but could exercise no extraordinary franchises or special privileges granted by the state incorporating it, as, for instance, the right to eminent domain, or the privilege of exemption from taxation: State v. Boston, etc. R. Co. 25 Vt. 433; Middle Bridge Co. v. Marks, 26 Me. 326; Taylor on Corp., 386. It was for the exercise of this extraordinary privilege and power of the state, the annual payment of $10,000 was stipulated. There is nothing in the act to indicate that this sum was paid in lieu of taxes, or for exemption from any duty which might otherwise be imposed upon the company, but for the privilege of exercising the right of eminent domain in the location of their road through the counties mentioned, under restrictions particularly specified. The effect of these acts of 1841 and 1846 was not to declare the company a corporation of the commonwealth, but, as Mr. Justice Thompson said in New York & Erie R. Co. v. Young, 33 Pa. 175, "for the purposes of these acts the rights involved are to be tested and judged by the same rules of law as if the company had been primarily incorporated by this commonwealth. So far as the road runs through this state under the privileges granted to it, the company is a quasi Pennsylvania corporation. The right of eminent domain, within the restrictions of the grant, was as fully conferred on them by the act of February 16, 1841, as it ever is conferred on corporations exclusively within the state, and their rights and duties under the privileges granted must be ruled by the same principles." One state may make a corporation of another state, as there organized and conducted, a corporation of its own, quoad property within its territorial jurisdiction: Railroad Co. v. Harris, 12 Wall. 65-82; Graham v. Railroad Co. 118 Pa. (?) 168. Thus it will be seen that the defendant exercises powers and franchises which they have received directly from the legislation of Pennsylvania; that a part of their property is actually within the limits of this state, and receives the protection of our laws, and there is no good reason why the company should not be held subject to the same regulations as corporations of our own state. We are of opinion that on this branch of the case the court was right.

The judgment is affirmed.

This general principle has been upheld by the Supreme Court of the United States as to domestic corporations, Bell's Gap R. R. Co v. Penna. 134 U. S. 232; but was not permitted to be applied in the case of a foreign corporation as to payments of interest even to bondholders residing in the state, where such payments were made in another state. Erie R. R. Co. v. Penna. 153 U. S. 628.

PEOPLE V. HORN SILVER MINING CO.

Court of Appeals of New York. March, 1887.
105 New York, 76.

Appeal from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made November 17, 1885, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 38 Hun. 276.)

The nature of the action and the material facts are stated in the opinion.

Earl, J. This action was commenced to recover certain taxes claimed to be due from the defendant under chapter 542 of the Laws of 1880, as amended by chapter 361, of the Laws of 1881, and chapter 151 of the Laws of 1882.

. . . .

Second. It is claimed that the defendant was not, during the years 1881 and 1882 "doing business in this State," and that, therefore it was not liable to taxation under the act of 1881. It is quite true that by far the larger share of its business was carried on in Utah, and at Chicago. But its president, secretary and treasurer had their offices in New York; the directors held their annual meetings there; its dividends were declared and paid there; its silver bullion was all sent there and sold there and the proceeds of it received there; some of the proceeds were deposited in banks, some loaned in the city of New York and some of it used for the purposes of the company in that city, and the balance was transferred to Chicago and Utah for use in the business of the company. There was thus a very substantial portion of its business done in the city of New York. The business did not consist of occasional transactions, but an office was kept there, and the business continuously transacted there during the whole year. We cannot construe the words "doing business in this State" to mean the whole business of the corporation within this State; and while we are not prepared to hold that an occasional business transaction, that keeping an office where meetings of the directors are held, transfer books kept, dividends declared and paid, and other business merely incidental to the regular business of the corporation is done would bring a corporation within this act; yet when, as in this case, all these things are done and in addition thereto a substantial part of the regular business of the corporation is carried on here, then we are unable to say that the corporation is not brought within the act as one "doing business in this State." There is no

injustice in subjecting to taxation such a corporation enjoying the benefits of our great mart, the advantages of our social order and the protection of our laws.

Third. It is further claimed that in computing the taxes, only the amount of defendant's capital employed within this State should have been taken as the basis and not its entire capital. We do not perceive how it is possible to limit the computation of the taxes as thus claimed. . . . .

It is very clear from this review of the two sections, that the whole capital stock, the same stock upon which dividends are declared and paid, is to be taken as the basis of taxation. And so we held in *People* v. *Equitable Trust Co.* (96 N. Y. 387), where we said that "we find no authority in this act for apportioning a tax upon such a corporation as this upon the amount of dividends earned in this State, or upon the amount of capital stock employed in this State."

. . . .

Our conclusion is that the judgment should be affirmed, with costs.

All concur except PECKHAM, J., dissenting and RAPALLO, J., not voting.

Judgment affirmed.

HORN SILVER MINING CO. V. NEW YORK STATE.

Supreme Court of the United States. February, 1892.
134 United States, 305.

Mr. Justice FIELD delivered the opinion of the court.

A corporation being the mere creature of the legislature, its rights, privileges and powers are dependent solely upon the terms of its charter. . . . The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most States this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation.

. . . .

The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a

condition of the grant, as well as, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. As to a foreign corporation—and all corporations in States other than the State of its creation are deemed to be foreign corporations—it can claim a right to do business in another State, to any extent, only subject to the conditions imposed by its laws.

. . . .

This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.

Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in *Bank of Augusta* v. *Earle,* 13 Pet. 519. One of these qualifications is that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* 96 U. S. 1, 12. The other limitation on the power of the State is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think, by the late Mr. Justice Bradley in *Stockton* v. *Baltimore & New York Railroad,* 32 Fed. 9, 14. As that learned justice said: "If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union." And this court, citing this passage, added, "without the permission and against the prohibition of the State." *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181, 186.

Having absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the

amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the State. Conceding such to be the case we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the State, and in doing such business it puts itself under the law of the State, however that may be characterized.

The only question therefore open to serious consideration in this case is one of fact: Did the Horn Silver Mining Company do business as a corporation within the State? The reference found such to be the fact, as a conclusion from many probative circumstances in the case. That finding was never set aside, but stands approved by the courts of New York.

. . . .

There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the State, according to the amount of its business or capital without the State. That is a matter, however, resting entirely in the control of the State, and not a matter of Federal law, and with which, of course, this court can in no way interfere.

Since this tax was levied the law of the State has been altered, and now the tax upon foreign corporations doing business in the State is estimated by the consideration only of the capital employed within the State. It is said that against nearly all other foreign corporations, except this one, the taxes upon their franchises have been computed upon the basis of the capital employed within the State; but as to that we can only repeat what was said in the Court of Appeals of the State, that, if this be true, the defendant may have reason to complain of unjust discrimination and may properly appeal for relief to the legislature of the State, but that it is not within the power of the court to grant any relief however great the hardship upon it.

The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation.

The products of the mine can be brought into the State and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company.

Judgment affirmed.

Mr. Justice HARLAN dissented.

Taxes discriminating against foreign corporations as compared with domestic corporations are perfectly proper provided they do not violate the interstate commerce provision of the constitution. Paul v. Virginia, 8 Wallace 183; see also Firemen's Fund v. Roome, 93 N. Y. 313. But the state cannot exclude from its limits a corporation engaged in interstate commerce. McCall v. California, 136 U. S. 104, and Norfolk & Western R. R. Co. v. Pennsylvania, 136 U. S. 114. As to the taxation of domestic corporations see Home Insurance Co. v. New York, 134 U. S. 594; Philadelphia and Southern Steamship Co. v. Pennsylvania, 122 U. S. 326; State Tax on Railway Gross Receipts, 15 Wallace (U. S.) 284; case of the State Freight Tax, 15 Wallace (U. S.) 23 *supra*. For state taxation of foreign corporations see Western Union Telegraph Co. v. Borough of New Hope, 187 U. S. 419; Ratterman v. Western Union Telegraph Co. 127 U. S. 411; Pickard v. Pullman, etc., Co. 117 U. S. 34 *supra*; and Pullman, etc., Co. v. Pennsylvania, 141 U. S. 18, Adams Express Co. v. Ohio State Auditor, 165 U. S. 194; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 *supra*.

IV. SITUS OF PROPERTY.

PEOPLE EX REL HOYT V. COMMISSIONERS.

Court of Appeals of New York. June, 1861.
23 New York, 224.

Appeal from the Supreme Court. Upon a *certiorari* to the Commissioners of Taxes and Assessments for the city and county of New York, they made a return from which these facts appeared: The relator was assessed $4,000 for personal property. He applied for a correction of the assessment, and testified that the value of all his personal property within this State was exceeded in amount by his just debts and liabilities. He also stated that he had personal property outside of this State, of the value of $4,000 over and above his debts and liabilities. The commissioners thereupon declined to correct the assessment. They, however, requested the relator to submit a written statement of his demand, and of the facts upon which it was based. In compliance with this request, he presented an affidavit showing that he was a merchant having his principal place of

business in the city of New Orleans, and having an office in New York, where he resided, only for the purchase of goods. He reiterated his previous statement that his personal property within this State did not exceed the amount of his debts, and declared that he had no other personal property except capital employed in his business in New Orleans, "which is taxed and taxable there, and farm, stock, and household furniture in the State of New Jersey, which are taxable by the laws of the said State of New Jersey." The commissioners decided that personal property has no *situs*, but follows the person, and "therefore denied his application for remission, notwithstanding that the goods and chattels owned by him are in the city of New Orleans, and without the State of New York." The assessment was adjudged valid, and affirmed, at general term in the first district, and an appeal was taken to this court.

COMSTOCK, C. J.—The legislature in defining property which is liable to taxation, have used the following language: "All lands and all personal estate *within this State*, whether owned by individuals or corporations, shall be liable to taxation subject to the exemptions hereinafter specified." (1 R. S., 387, § 1). The title of the act in which this provision is contained is, "of the property liable to taxation," and it is in this title that we ought to look for controlling definitions on the subject. Other enactments relate to the details of the system of taxation, to the mode of imposing and collecting the public burdens, and not to the property or subject upon which it is imposed. In order, therefore, to determine the question now before us, the primary requisite is to interpret justly and fairly the language above quoted.

"All lands and all personal estate within this State shall be liable to taxation." If we are willing to take this language, without attempting to obscure it by introducing a legal fiction as to the *situs* of personal estate, its meaning would seem to be plain. Lands and personal property having an actual situation within the State are taxable, and by a necessary implication no other property can be taxed. I know not in what language more appropriate or exact, the idea could have been expressed. Real and personal estate are included in precisely the same form of expression. Both are mentioned as being within the State. It is conceded that lands lying in another State or country, cannot be taxed against the owner resident here, and no one ever supposed the contrary. Yet it is claimed that goods and chattels situated in Louisiana, or in France, can be so taxed. The legislature, I suppose, could make this distinction, but that they have not made it, the language of the statute is perfectly clear. Nor is the reason

apparent why such a distinction should be made. Lands have an actual *situs,* which, of course, is immovable. Chattels also have an actual *situs,* although they can be moved from one place to another. Both are equally protected by the laws of the State or sovereignty in which they are situated, and both are chargeable there with public burdens, according to all just principles of taxation. A purely poll tax has no respect to property. We have no such tax. With us taxation is upon property, and so it is in all the States of the Union. So also in general, it is in all countries. The logical result is, that the tax is incurred within the jurisdiction and under the laws of the country where it is situated. If we say that taxation is on the person in respect to the property, we are still without a reason for assessing the owner resident here, in respect to one part of his estate situated elsewhere, and not in respect to another part. Both, I repeat, are the subjects of taxation in the foreign jurisdiction. If then the owner ought to be subjected to a double burden as to one, why not as to the other also?

I find then no room for interpretation, if we take the words of the statute in their plain ordinary sense. The legislative definition of taxable property, refers in that sense to the actual *situs* of personal not less than real estate. If the intention had been different, it cannot be doubted that different language would have been used.

. . . .

It is said, however, that personal estate by a fiction of law has no *situs* away from the person or residence of the owner, and is always deemed to be present with him at the place of his domicil. The right to tax the relator's property situated in New Orleans and New Jersey, rests upon the universal application of this legal fiction; and it is accordingly insisted upon as an absolute rule or principle of law which, to all intents and purposes, transfers the property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory will lead us. The necessary consequence is, that goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad. They cannot be taxed here because they are with the owner who is a citizen or subject of some foreign State. On the same ground, if we are to have harmonious rules of law, we ought to relinquish the administration of the effects of a person resident and dying abroad, although the claims of domestic creditors may require such administration. So, in the case of the bankruptcy of such a person, we should at once send abroad his effects, and cannot consistently retain them to satisfy the claims of our own

citizens. Again, we ought not to have laws for attaching the personal estate of non-residents, because such laws necessarily assume that it has a *situs* entirely distinct from the owner's domicil. Yet we do in certain cases, administer upon goods and chattels of a foreign decedent; we refuse to give up the effects of a bankrupt until creditors here are paid; and we have laws of attachment against the effects of non-resident debtors. These, and other illustrations which might be mentioned, demonstrate that the fiction or maxim *mobilia personam sequuntur* is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances the truth and not the fiction affords as it plainly ought to afford, the rule of action. The proper use of legal fictions is to prevent injustice, according to the maxim, *in fictione juris semper aequitas existat.* "No fiction," says Blackstone, "shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, which might result from the general rule of law." So, Judge Story, referring to the *situs* of goods and chattels, observes: "The general doctrine is not controverted, that although movables are for many purposes to be deemed to have no *situs,* except that of the domicil of the owner, yet this being but a legal fiction it yields whenever it is necessary, for the purpose of justice, that the actual *situs* of the thing should be examined." He adds, quite pertinently, I think, to the present question, "a nation within whose territory any personal property is actually situated, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." (Confl. of Laws, § 550). I can think of no more just and appropriate exercise of the sovereignty of a State or nation over property, situated within it and protected by its laws, than to compel it to contribute toward the maintenance of government and law.

Accordingly there seems to be no place for the fiction of which we are speaking, in a well adjusted system of taxation. In such a system a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the *situs* of the property, or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power.

. . . .

It seems to follow then inevitably that before we can uphold the tax which has been imposed upon the relator's property situated in New Orleans and New Jersey, we must first determine, that if he resided there, and the same goods and chattels were located here, they could

not be taxed as being within the State. Such a determination, I am satisfied, would contravene the plain letter of the statute as well as all sound principles underlying the subject.

. . . .

Let us now take in, at a single view, all the legislation of the State which constitutes the existing code on this subject. We have, in the first place, the fundamental definition which is the basis of all taxation, describing the subject as "all real and all personal estate within this State." The same revisors and the same legislators who thus defined the basis, prescribed the mode of assessment. Every owner of personal estate was to be assessed in the town or ward where he resided, but this alone would not embrace the case of a non-resident, whose property was within the State. But there is no such thing as a vacant possession of personal estate. Therefore the term owner was made to include trustees, guardians, &c., and they were to be assessed for property in their possession or under their control, whoever and wherever the beneficial owner might be. In that mode, the estates of non-residents having a *situs* here were reached. But it was at least doubtful whether the terms trustees, guardians, &c., were sufficiently descriptive to include property of non-residents situated here, under all conditions which ought to subject it to taxation. The more comprehensive word "agent" therefore, was added in 1851; but in order that this word might not carry the principle to results unjust and inexpedient, the legislature with becoming caution made at the same time a special exception in favor of property and money sent here from other States for sale or investment. The very language of the exception was an unmistakable assertion of the principle. Then in 1855, a serious defect in the system had been developed. Non-residents of the State were found to be personally, either as principals or partners, in the possession and management of large capitals or estates within the State. They could not be assessed, as the laws were, and there was no agent or trustee to assess in respect to property thus situated. The system was accordingly improved and extended so as to embrace such cases.

Thus we have a system apparently symmetrical and complete, according to which all personal estate having an actual *situs* in this State is brought within the sphere of taxation without regard to the domicil of the owner, with only special exceptions dictated by policy and justice. And if this be the rule of taxation where the *situs* of the thing to be taxed, and the domicil of the owner are different, it is conceded that the opposite rule cannot and does not prevail. Proceeding on this rule, Louisiana and New Jersey very justly imposed

a share of their public burdens on the property of the relator situated in those States. The State of New York will do the same thing in respect to the citizens of those States having property here, but it is not so unjust to its own citizens as to load them with double burdens by proceeding on the opposite principle also. I am confident there is nothing in all our legislation which affords any ground for imputing to it such inconsistency and injustice. . . . . .

I conclude the discussion of this question by a brief reference to the course of decision in other courts of this country. In the case of *The City of New Albany* v. *Meekin,* (3 Ind. R. 481), the charter of the town conferred the right of taxing all real and all personal estate within the city. The defendant was a resident of the city, and was assessed in respect to a steamboat enrolled at Louisville, and which touched only occasionally at New Albany. The action was debt, to recover the amount of the assessment. But it was held that the tax was illegal, and that no recovery could be had. The Supreme Court observed, "the only question we have to consider is, whether the boat, or the defendant's share, is within the city." The same point arose upon a grant of the right of taxation, in the same words, in the case of *Wilkey* v. *The City of Pekin* (19 Ill. R., 160), and the question was determined in the same way. The court said: "as a general rule personal property follows the person of the owner, but municipal corporations have no power to protect property not within their corporate limits, nor can they render any equivalent for the right of taxing such property, and there is no propriety in the application of this rule to them for the purposes of revenue." "It is evident," the court added, "that the legislature intended to confine the power of taxation to property actually within the territorial jurisdiction." In *Johnson* v. *The City of Lexington,* (14 B. Munroe, 648), the city government under its charter had authority to make a list of its taxable inhabitants, and to assess against them their real estate within the city, and also the just and true value of such personal estate as the Mayor, &c. should designate. The Court of Appeals of Kentucky held that this power extended only to personal estate within the city, and that the property referred to was such as had an actual *situs,* and not merely such as had a legal or constructive *status* within the city, and which, they observed, is regarded only "for some purposes as being with its owner where he is domiciled." In *Finley* v. *The City of Philadelphia,* (32 Penn. 381), the plaintiff was a surgeon in the United States army, stationed and keeping house in that city, but without any domiciliary intention. He was assessed in respect to his household furniture, and claimed to be exempt in consequence of his non-

residence and occupation. But the Supreme Court decided otherwise; Chief Justice LOWRIE observing: "there is nothing poetical about tax laws. Wherever they find property, they claim a contribution for its protection without any special respect to the owner or his occupation." In *Catlin* v. *Hull* (21 Verm. 152), a person residing in New York owned personal estate, consisting of notes and other obligations of debtors who were residents of the State of Vermont. These he had deposited with the plaintiff, residing in the town of Orwell in that State, as his agent, for management, collection and investment, and the plaintiff being such agent was assessed in that capacity for the estate thus in his hands. His own property being seized on the warrant for the collection of the tax, he brought trespass for such seizure, and the only question was, whether the property of the non-resident owner was subject to taxation in that town. The statute of that State, very much like ours, provided that personal estate held in trust by an executor, administrator, agent or trustee, should be assessed to such executor, &c. Among the propositions argued on behalf of the plaintiff it was insisted that personal estate, and especially debts due, having no fixed *situs*, follow the person and are to be considered as situate where his domicil is, and hence that the property in question could not be taxed, because the owner was domiciled out of the State. If such was the intention of the legislature, it was denied that they had the power of taxation in such a case. The argument was carefully considered, and was rejected by the Supreme Court of that State. After referring to and recognizing the fiction insisted on, it was observed by the court: "But this rule is merely a legal fiction, adopted from considerations of general convenience and policy for the benefit of commerce, and to enable persons to dispose of property at their decease, agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country where the same is situated. "But this doctrine," it was added, "in relation to the *situs* of personal chattels, and their transfer and distribution, we do not consider as at all conflicting with the actual jurisdiction of the State where it is situate, over it, or with the right to subject it, in common with the other property of the State, to share in the burden of government by taxation." And it was further observed, "we are not only satisfied that this method of taxation is well founded in principle and upon authority, but we think it entirely just and equitable, that if persons residing abroad bring their property and invest it in this State for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefit and advantages of

our laws for the protection of their property, their property should yield its due proportion towards the support of the government which thus protects it."

The cases which I have referred to were determined by the highest courts in five States of the Union. They appear to be entirely pertinent to the question now before us, and I am not aware of a single decision to the contrary, except the one under review. These cases not only establish a construction of statutes framed like our own, but they all assert the principles of taxation, which lie at the very foundation of the subject. (See also Story's Confl. of Laws, pp. 19, 462). My conclusion, therefore, derived from the statutes, from these authorities and from the reasons of a general nature which ought to influence the decision of such a question, is that the relator was not subject to taxation for his personal estate, having an actual situation in New Jersey and Louisiana. This conclusion is intended to embrace only property which is visible and tangible, so as to be capable of a *situs* away from the owner or his domicil; and I do not consider the question in reference to personal estate of a different description. It must be within the State in order to be subject to taxation, for so is the statute; but that may be true of choses in action, and obligations for the payment of money due to a creditor resident here, from a debtor whose domicil is in another State. If the securities are separated from the person and domicil of the owner, and are actually in the hands of an agent in another State for collection, investment and reinvestment there, it may be that capital thus situated should be regarded as foreign and not domestic, in the absence of any special statutory provision intended for such a case. Questions of this character need not now be determined. It may be proper to add in respect to chattels which are in transit through the State, that they ought not to be considered as having a *situs* here, so as to be subject to taxation. On the other hand, I have no doubt that ships at sea, registered at a port within this State and consequently having no *situs* elsewhere, are justly taxable to the resident owner.

. . . .

The judgment of the Supreme Court should be reversed, and judgment must be rendered that the assessment roll be corrected by striking therefrom the assessment against the relator.

SELDEN, LOT, JAMES and DAVIES, Js., concurring.

Ordered accordingly.

Cases in this collection relative to the situs of land for the purposes of taxation are: Matter of Swift, 137 N. Y. 77; Miller v. Pennsylvania, 111 Pa. St. 321; Estate of Handley, 181 Pa. St. 339 *supra*.

PEOPLE EX REL JEFFERSON V. SMITH ET AL. ASSESSORS, &C.

Court of Appeals of New York. April, 1882. — 88 New York, 576.

Earl, J. The appellants, as assessors of the village of Warsaw, in 1880, assessed the relator for $250,000 personal property. The property so assessed consisted of mortgage securities taken by agents of the relator, residents in the States of Illinois, Minnesota and Wisconsin, who retained the custody of the securities so taken which were never brought within the territorial limits of the State of New York, and which were, at all times after they were taken, in the possession and under the control of such non-resident agents. All interest payable on such securities was paid directly to the agents, and, with the exception of small sums remitted to the relator for family expenses and used as such, and money remitted to and used by him to pay his debts, such interest was invested by the agents in like manner with the principal, and the securities taken therefor were held in like manner as the original securities. When the principal of the securities became due and was paid, it was paid to the agents and by them reinvested in like manner as the original investments, and such new securities were held by the agents in like manner as the original securities. The agents had power to discharge the securities on payment of the same, and did so discharge them, and they had power to accept applications for loans, and make loans without submitting the same to the relator for approval. The funds so kept for investment, until the same were invested were kept in the names of the agents. By the laws of the States where such securities were so taken and held, they were subject to taxation under the laws of such States in the hands of the agents. The agents had advertised offices and places of business where the business of the relator in making such loans was carried on and the securities were held.

After the imposition of the assessment complained of, the relator applied to the appellants as such assessors to correct the assessment-roll by striking the assessment therefrom, and the application was denied. Whereupon the relator, under chapter 269 of the Laws of 1880, sued out a writ of *certiorari* to which the appellants made return, and upon the hearing at the Special Term judgment was rendered striking the assessment from the assessment-roll. The assessors appealed from the judgment to the General Term, and from affirmance there to this court.

The question for our determination is whether the securities so taken and held for the relator were subject to taxation in this State while in the hands of his non-resident agents. The solution of this question depends upon the construction to be given to the following section of the Revised Statutes: "All lands and all personal estate within this State, whether owned by individuals or by corporations, shall be liable to taxation subject to the exemptions hereinafter specified." (2 R. S. (7th ed.) 981).

Before the personal estate can be taxed in this State under the statute it must be within the State. There is no more authority for taxing personal property not within the State than there is for taxing lands not within the State. The claim, however, of the learned counsel for the assessors is that these securities or the debts secured by them were choses in action which could not be separated or have an actual *situs* away from the owner, and that they must be treated as existing and present at the domicile of the owner and hence that they are taxable at the place of such domicile.

It is undoubtedly a general rule of law that movable property is deemed to have no *situs* except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined, and whenever the legislative intent is manifested that this legal fiction should not operate. The fiction frequently applies as well to the case of tangible personal property, such as merchandise, as to the case of choses in action. But it was directly held in the case of *Hoyt* v. *The Commissioners of Taxes* (23 N. Y. 224), that tangible personal property, having a *situs* outside of this State could not, under our statutes, be treated as existing at the domicile of the owner in this State for the purpose of taxation here; and it only remains to be determined now, whether securities situated like those here in question, are to be treated by operation of the fiction referred to as within this State. I am of opinion that it is sufficiently clear that it was the legislative intent that they should not be so treated.

That choses in action can have a *situs* away from the domicile of the owner for the purpose of taxation and for other purposes, is frequently manifested in the statutes of this State.

. . . .

I think it may safely be said that the legal fiction that choses in action always attend the owner and have a legal existence only at the place of his domicile has been frequently ignored by the legislature in framing our system of taxation, and that it cannot be resorted to as a safe guide in the construction of the provision of the statute

now under consideration. The statute providing for the taxation of "personal estate within this State" was not intended to subject to taxation, personal securities actually in another State, held, managed and controlled there, under the protection of the laws of that State, and subject to taxation there, in the hands of agents. It cannot be supposed that the legislature intended that our citizens should be subject to taxation here and in other States also upon the same property, or that it would tax in the hands of agents here securities belonging to non-resident owners, while it denied the right of other States to tax the securities of our citizens in the hands of agents there.

. . . .

It is clear from the statutes . . . . and the authorities cited and from the understanding of business men in commercial transactions, as well as of jurists and legislators, that mortgages, bonds, bills and notes have for many purposes come to be regarded as property and not as the mere evidence of debts, and that they may thus have a *situs* at the place where they are found, like other visible, tangible chattels.

Without extending this discussion further, we are therefore of opinion that the judgment should be affirmed.

All concur. Judgment affirmed.

PULLMAN'S PALACE CAR CO. V. PENNSYLVANIA.

Supreme Court of the United States. October, 1890.
141 United States, 18.

Mr. Justice GRAY, after stating the case . . . . delivered the opinion of the court.

Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the State is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that

State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. *Green* v. *Van Buskirk*, 5 Wall. 307, and 7 Wall. 139; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Harkness* v. *Russell*, 118 U. S. 663, 679; *Walworth* v. *Harris*, 129 U. S. 355; Story on Conflict of Laws, § 550; Wharton on Conflict of Laws, §§ 297-311.

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For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. *Lane County* v. *Oregon*, 7 Wall. 71, 77; *Railroad Co.* v. *Pennsylvania*, 15 Wall. 300, 323, 324, 328; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 29; *Tappan* v. *Merchants' Bank*, 19 Wall. 490, 499; *State Railroad Tax Cases*, 92 U. S. 575, 607, 608; *Brown* v. *Houston*, 114 U. S. 622; *Coe* v. *Errol*, 116 U. S. 517, 524; *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117, 123.

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. *Delaware Railroad Tax*, 18 Wall. 206, 232; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 206, 211; *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530, 549; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117, 124; *Leloup* v. *Mobile*, 127 U. S. 640, 649.

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The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its

property within the State is, in substance and effect, a tax on that property. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 209; *Western Union Telegraph Co.* v. *Attorney General of Massachusetts,* 125 U. S. 530, 552. This is not only admitted, but insisted on, by the plaintiff in error.

The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property, within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purpose of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain in the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole

case, and was not limited, as upon writs of error to the state courts, to questions under the Constitution and laws of the United States.

In the *State Railroad Tax Cases,* 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital and franchise, was assessed by the state board of equalization, and was collected in each municiplity in proportion to the length of the road within it, was lawful, and not in conflict with the Constitution of the State; and Mr. Justice Miller delivering judgment said:

"Another objection to the system of taxation by the State is, that the rolling stock, capital stock and franchise are personal property, and that this, with all other personal property, has a local situs at the principal place of business of the corporation, and can be taxed by no other county, city, or town, but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its situs, follows the domicil of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. *Green* v. *Van Buskirk,* 5 Wall. 312. Like all other laws of a State, it is, therefore, subject to legislative repeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation." 92 U. S. 607, 608.

"It is further objected that the railroad track, capital stock and franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city and town collects taxes according to the length of the track within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as

the basis of taxation. *Delaware Railroad Tax,* 18 Wall. 206; *Erie Railroad* v. *Pennsylvania,* 21 Wall. 492." 92 U. S. 608, 611.

So in *Western Union Telegraph Co.* v. *Attorney General of Massachusetts,* 125 U. S. 530, this court upheld the validity of a tax imposed by the State of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the State, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.

Even more in point is the case of *Marye* v. *Baltimore & Ohio Railroad,* 127 U. S. 117, in which the question was whether a railroad company incorporated by the State of Maryland, and no part of whose own railroad was within the state of Virginia, was taxable under the general laws of Virginia upon rolling stock owned by the company, and employed upon connecting railroads leased by it in that State, yet not assigned permanently to those roads, but used interchangeably upon them and upon other roads in other States, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that State; and Mr. Justice Matthews delivering the unanimous judgment of the court, said:

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if, and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the situs of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the situs of all its personal property; but for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individuals items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases,

the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." 127 U. S. 123, 124.

For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its situs at the owner's domicil, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether.

Judgment affirmed.

Mr. Justice BRADLEY, with whom concurred Mr. Justice FIELD and Mr. Justice HARLAN, dissenting.

ADAMS EXPRESS CO. V. OHIO STATE AUDITOR.

Supreme Court of the United States.
165 United States, 194.

These are cases involving the constitutionality of certain laws of the State of Ohio providing for the taxation of telegraph, telephone and express companies, and the validity of assessments of express companies thereunder.

. . . .

The law created a State board of appraisers and assessors, consisting of the auditor of State, treasurer of State and attorney general, which was charged with the duty of assessing the property in Ohio of telegraph, telephone and express companies. By the act as amended, between the first and thirty-fist days of May annually each telegraph, telephone and express company, doing business in Ohio, was required to file a return with the auditor of State, setting forth among other things the number of shares of its capital stock; the par value and market value (or, if there be no market value, then the actual value)

of its shares at the date of the return; a statement in detail of the entire real and personal property of said companies and where located, and the value thereof as assessed for taxation. Telegraph and telephone companies were required to return, also the whole length of their lines, and the length of so much of their lines as is without and is within the State of Ohio, including the lines controlled and used, under lease or otherwise. Express companies were required to include in the return a statement of their gross receipts, from whatever source derived, for the year ending the first day of May, of business wherever done; and of the business done in the State of Ohio, giving the receipts of each office in the State; also the whole length of the lines of rail and water routes over which the companies did business, within and without the State. Provision was made in the law for the organization of the board, for the appointing of one of its members as secretary and the keeping of full minutes of its proceedings. The board was required to meet in the month of June and assess the value of the property of these companies in Ohio. The rule to be followed by the board in making the assessment was that "in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

. . . .

The valuation of all the real estate of the companies, situated in Ohio, was required to be deducted from the total valuation, as fixed by the board.

Provisions were made for hearings and for the correction of erroneous and excessive valuations.

. . . .

Mr. Justice FULLER, after stating the case, delivered the opinion of the court.

. . . .

The legislation in question is claimed to be repugnant to the Constitution of the United States because in violation of the commerce clause of that instrument, and because operating to deprive appellants of their property without due process of law and of the equal protection of the laws.

We assume that the assessments complained of were made in pursuance of the definite rule or principle of appraisement recognized and established by the Nichols law, as construed by the Supreme Court of Ohio, and the question is whether the law prescribing that rule is valid under the Federal Constitution.

The principal contention is that the rule contravenes the commerce clause because the assessments, while purporting to be on the property of complainants within the State, are in fact levied on their business, which is largely interstate commerce.

Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government. *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688.

As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several States through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State, without violating any Federal restriction. *Western Union Telegraph Co.* v. *Massachusetts,* 125 U. S. 530; *Massachusetts* v. *Western Union Telegraph Co.,* 141 U. S. 40; *Maine* v. *Grand Trunk Railway,* 142 U. S. 217; *Pittsburgh, Cincinnati &c. Railway* v. *Backus,* 154 U. S. 421; *Cleveland, Cincinnati &c. Railway* v. *Backus,* 154 U. S. 439; *Western Union Telegraph Co.* v. *Taggart,* 163 U. S. 1; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18. The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails, and spikes of the railroad company; or the cars of the sleeping car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on,

a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situate in a particular State, is in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole, *Pittsburgh &c. Railway* v. *Backus,* 154 U. S. 421; or taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which the cars are run in a particular State bears to the whole number of miles traversed by them in that and other States, *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18; or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of all its lines every where, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, *Western Un. Tel. Co.* v. *Taggart,* 163 U. S. 1.

Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use.

The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicated.

No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph and sleeping car companies, to roadbeds, rails and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business.

The same party may own a manufacturing establishment in one State and a store in another, and may make profit by operating the two, but the work of each is separate. The value of the factory in itself is not conditioned on that of the store or *vice versa,* nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through different States is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business.

It is this which enabled the companies represented here to charge and receive within the State of Ohio for the year ending May 1, 1895, \$282,181, \$358,819 and \$275,446, respectively, on the basis, according to their respective returns, of \$42,065, \$28,438 and \$23,430, of personal property owned in that State, returns which confessedly do not, however, take into account contracts for transportation and accompanying facilities.

Considered as distinct subjects of taxation, a horse is, indeed, a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch; but how is it that \$23,430 worth of horses, wagons, safes and pouches produces \$275,446 in a single year? or \$28,438 worth, \$358,519? The answer is obvious.

Reliance seems to be placed by counsel on the observation of Mr. Justice Lamar, in *Pacific Express Company* v. *Seibert,* 142 U. S. 339, 354, that "express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted." But the reference was to the legislation of the State of Missouri, and the scheme of taxation under consideration here was not involved in any manner.

. . . .

Assuming the proportion of capital employed in each of several States through which such a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it is only indirectly. The taxation is essentially a

property tax, and, as such, not an interference with interstate commerce.

Nor, in this view, is the assessment on property not within the jurisdiction of the taxing authorities of the State and for that reason amounting to a taking of property without due process of law. The property taxed has its actual situs in the State and is, therefore, subject to the jurisdiction, and the distribution among the several counties is a matter of regulation by the State legislature. *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22; *State Railroad Tax Cases,* 92 U. S. 575; *Delaware Railroad Tax,* 18 Wall. 206; *Erie Railroad* v. *Pennsylvania,* 21 Wall. 492; *Columbus Southern Railway* v. *Wright,* 151 U. S. 470.

. . . .

There is here no attempt to tax property having a situs outside of the State, but only to place a just value on that within. Presumptively all the property of the corporation or company is held and used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used.

Special circumstances might exist, as indicated in *Pittsburgh, Cincinnati &c. Railway* v. *Backus,* 154 U. S. 421, 443, which would require the value of a portion of the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the cases at bar is that there is no showing of any such separate and distinct property which should be deducted, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis.

The States through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute.

. . . .

We are, also, unable to conclude that the classification of express companies with railroad and telegraph companies as subject to the unit rule, denies the equal protection of the laws. The provision in the Fourteenth Amendment "was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways," nor was that amendment "intended to compel a State

to adopt an iron rule of equal taxation." *Bell's Gap Railroad* v. *Pennsylvania,* 134 U. S. 232.

In *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, 351, in which a tax on gross receipts of express companies in the State of Missouri was sustained, Mr. Justice Lamar, speaking for the court, well says:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property irrespective of its nature or condition or class will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

And see *Kentucky Railroad Tax Cases,* 115 U. S. 321; *Home Insurance Co.* v. *New York,* 134 U. S. 594.

The policy pursued in Ohio is to classify property for taxation, when the nature of the property, or its use, or the nature of the business engaged in, requires classification, in the judgment of the legislature, in order to secure equality of burden; and property of different sorts is classified under various statutory provisions for the purposes of assessment and taxation. The state constitution requires all property to be taxed by a uniform rule and according to its true value in money, and it was held by the Supreme Court of Ohio in *State* v. *Jones* that the Nichols law did not violate that requirement.

In *Wagoner* v. *Loomis,* 37 Ohio St. 571, it was ruled that: "Statutory provisions, whereby different classes of property are listed and valued for taxation in and by different modes and agencies, are not necessarily in conflict with the provisions of the constitution which require all property to be taxed by a uniform rule and according to its true value in money." And the court said: "A faithful execution of the different provisions of the statutes would place upon the duplicate for taxation all the taxable property of the State, whether bank stocks or other personal property or real estate, according to its true value in money; and the equality required by the constitution has no other test."

The constitutional test was held to be complied with, whatever the mode, if the result of the assessment was that the property was assessed at its true value in money.

Considering, as we do, that the unit rule may be applied to

express companies without disregarding any other Federal restriction, we think it necessarily follows that this law is not open to the objection of denying the equal protection of the laws.

We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that "whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined." *Pittsburgh, Cincinnati &c. Railway* v. *Backus,* 154 U. S. 434; *Western Union Telegraph Co.* v. *Taggart,* 163 U. S. 1.

Decrees affirmed.

Mr. Justice WHITE, with whom concurred Mr. Justice FIELD, Mr. Justice HARLAN and Mr. Justice BROWN, dissenting.

But the unit rule may not be so applied as to include property, such as investment securities in which a surplus is invested, which is not used in the business and is situated outside of the state. Fargo v. Hart, 194 U. S. 490.

GLOUCESTER FERRY CO. V. PENNSYLVANIA.

Supreme Court of the United States. October, 1884.
114 United States, 196.

In March, 1865, the Gloucester Ferry Company, the plaintiff in error here, was incorporated by the legislature of New Jersey to establish a steamboat ferry from the town of Gloucester, in that State, to the city of Philadelphia, in Pennsylvania, with a capital stock of $50,000, divided into shares of $50 each. During that year it established, and has ever since maintained, a ferry between those places, across the river Delaware, leasing or owning steam ferry-boats for that purpose. At each place it has a slip or dock on which passengers and freight are received and landed; the one in Gloucester it owns, the one in Philadelphia it leases. Its entire business consists in ferrying passengers and freight across the river between those places. It has never transacted any other business. It does not own, and has never owned, any property, real or personal, in the city of

Philadelphia other than the lease of the slip or dock mentioned. All its other property consists of certain real estate in the county of Camden, New Jersey, needed for its business, and steamboats engaged in ferriage. These boats are registered at the port of Camden, New Jersey. It has never owned any boats registered at a port of Pennsylvania, and its boats are never allowed to remain in that State except so long as may be necessary to discharge and receive passengers and freight.

In July, 1880, the Auditor-General and the Treasurer of the State of Pennsylvania stated an account against the Company of taxes on its capital stock, based upon its appraised value, for the years 1865 to 1879, both inclusive, finding the amount of $2,593.96 to be due the Commonwealth. From this finding an appeal was taken to the Court of Common Pleas of Philadelphia, and was there heard upon a case stated, in which it was stipulated that, if the court were of the opinion that the company was liable for the tax, judgment against it in favor of the Commonwealth should be entered for the above amount; but if the court were of the opinion that the company was not liable, judgment should be entered in its favor.

A statute of Pennsylvania, passed June 7, 1879, "to provide revenue by taxation," in its fourth section enacted as follows: "That every company or association whatever, now or hereafter incorporated by or under any laws of this Commonwealth, or now or hereafter incorporated by any other State or Territory of the United States or foreign government, and doing business in this Commonwealth, or having capital employed in this Commonwealth in the name of any other company or corporation, association or associations, person or persons, or in any other manner, except foreign insurance companies, banks and savings institutions, shall be subject to and pay into the treasury of the Commonwealth annually a tax to be computed as follows, namely: If the dividend or dividends made or declared by such company or association as aforesaid, during any year ending with the first Monday of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-half mill upon the capital stock for each one per centum of the dividend so made or declared; if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of three mills upon each dollar of a valuation of the said capital stock," made in accordance with the provision of another section of the act.

It was under the authority of this act that the taxes in question

were stated against the company by the Auditor-General and the State Treasurer.

The Court of Common Pleas held that the taxes could not be lawfully levied, for there was no other business carried on by the company in Pennsylvania except the landing and receiving of passengers and freight, which is a part of the commerce of the country, and protected by the Constitution from the imposition of burdens by State legislation. It, therefore, gave judgment in favor of the Company. The case being carried on a writ of error to the Supreme Court of the State, the judgment was reversed and judgment ordered in favor of the Commonwealth for the amount mentioned. To review this latter judgment, the case was brought here.

Mr. Justice FIELD delivered the opinion of the court. He stated the facts as above recited, and continued:

The Supreme Court of the State, in giving its decision in this case, stated that the single question presented for consideration was whether the company did business within the State of Pennsylvania during the period for which the taxes were imposed; and it held that it did do business there because it landed and received passengers and freight at its wharf in Philadelphia, observing that its whole income was derived from the transportation of freight and passengers from its wharf at Gloucester to its wharf at Philadelphia, and from its wharf at Philadelphia to its wharf at Gloucester; that at each of these points its main business, namely, the receipt and landing of freight and passengers, was transacted; that for such business it was dependent as much upon the one place as upon the other; that, as it could hold the wharf at Gloucester, which it owned in fee, only by purchase by virtue of the statutory will of the Legislature of New Jersey; so it could hold by lease the one in Philadelphia only by the implied consent of the Legislature of the Commonwealth; and that, therefore, it "was dependent equally, not only for its business, but its power to do that business, upon both States. and might therefore be taxed by both." 98 Penn. St. 105, 116.

As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation.

It matters not that the transportation is made in ferry-boats, which pass between the States every hour of the day.

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As to the second reason given for the decision below, that the company could not lease its wharf in Philadelphia except by the implied consent of the Legislature of the Commonwealth, and thus is dependent upon the Commonwealth to do its business, and therefore can be taxed there, it may be answered that no foreign or inter-State commerce can be carried on with the citizens of a State without the use of a wharf, or other place within its limits on which passengers and freight can be landed and received, and the existence of a power in a State to impose a tax upon the capital of all corporations engaged in foreign or inter-State commerce for the use of such places would be inconsistent with and entirely subversive of the power vested in Congress over such commerce. Nearly all the lines of steamships and of sailing vessels between the United States and England, France, Germany and other countries of Europe, and between the United States and South America, are owned by corporations; and if by reason of landing or receiving passengers and freight at wharves, or other places in a State, they can be taxed by the State on their capital stock on the ground that they are doing business within her limits, the taxes which may be imposed may embarrass, impede, and even destroy such commerce with the citizens of the State. If such a tax can be levied at all, its amount will rest in the discretion of the State. It is idle to say that the interests of the State would prevent oppressive taxation. Those engaged in foreign and inter-State commerce are not bound to trust to its moderation in that respect; they require security. And they may rely on the power of Congress to prevent any interference by the State until the act of commerce, the transportation of passengers and freight, is completed.

. . . .

It is true that the property of corporations engaged in foreign or inter-State commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State. As said by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, "all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

In *Hays* v. *Pacific Mail Steamship Co.* 17 How. 596, the defendant,

a corporation of New York, owned steam vessels employed in the transportation of passengers and freight between New York and San Francisco, and between New York and different ports in Oregon, which were registered in New York. . . . It was held that the vessels were not subject to taxation in California, as they were only temporarily there while engaged in lawful trade and commerce.

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In *Morgan* v. *Parham,* 16 Wall. 471, it was held that a vessel registered in New York was not subject to taxation in Alabama, though engaged in commerce as one of a regular line of steamers between Mobile in that State and New Orleans in Louisiana.

. . . .

In *St. Louis* v. *The Ferry Co.* 11 Wall, 423, the company was incorporated by Illinois to run a ferry from a place opposite St. Louis to that city across the Mississippi.

. . . .

. . . It paid a ferry license to St. Louis and a wharfage tax for the use of its wharf there. In addition to these charges the city authorities assessed a tax on the company for the value of the boats as property *within the city*, all property within it being taxable under a statute of the State. The court held that the tax was illegally levied, as the boats were not property within the city.

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In the recent case of *Commonwealth of Pennsylvania* v. *Standard Oil Co.* 101 Penn. St. 119, the liability of foreign corporations doing business within that State is elaborately considered by its Supreme Court.

. . . .

In giving its decision the court said that it had been repeatedly decided and was settled law that a tax upon the capital stock of a company is a tax upon its property and assets (citing to that effect a large number of decisions); that it was undoubtedly competent for the legislature to lay a franchise or license tax upon foreign corporations for the privilege of doing business within the State, but that the tax in that case was in no sense a license tax; that the State had never granted a license to the Standard Oil Company to do business there, but merely taxed its property, that is, its capital stock, to the extent that it brought such property within its borders in the transaction of its business; that the position of the Commonwealth, that a foreign corporation entering the State to do business brought its entire capital, was ingenious, but unsound; that it was a fundamental principle that, in order to be taxed, the person must

have a domicil within the State, and the thing must have a *situs* therein; that persons and property in transitu could not be taxed; that the domicil of a corporation was in the State of its origin, and it could not emigrate to another sovereignty; that the domicil of the Standard Oil Company was in Ohio, and when it sent its agents into the State to transact business it no more entered the State in point of fact that any other foreign corporation, firm, or individual who sent an agent there to open an office or branch house, nor brought its capital there constructively; that it would be as unreasonable to assume that a business firm in Ohio brought its entire capital there because it sent its agent to establish a branch of its business, as to hold that the Standard Oil Company, by employing certain persons in the State to transact a portion of its business, thereby brought all its property or capital stock within the jurisdiction of the State, that there was neither reason nor authority for such a proposition; that the company was taxable only to the extent that it brought its property within the State; and that its capital stock, as mentioned in the act of the legislature, must be construed to mean so much of the capital stock as was measured by the property actually brought within the State by the company in the transaction of its business. The justice who delivered the opinion of the court added, speaking for himself, that he conceded the power of the Commonwealth to exclude foreign corporations altogether from her borders, or to impose a license tax so heavy as to amount to the same thing; but he denied, great and searching as her taxing power is, that she could tax either persons or property not within her jurisdiction. "A foreign corporation," he said, "has no domicil here, and can have none; hence it cannot be said to draw to itself the constructive possession of its property located elsewhere. There are a large number of foreign insurance companies doing business here under a license from the State. Some of them have a very large capital. It is usually invested at the domicil of the company. If the position of the Commonwealth is correct, she can tax the entire property of the Royal Insurance Company, although the same is located almost wholly in England, or the assets of the New York Mutual, located in New York."

Under this decision there is no property held by the Gloucester Ferry Company which can be the subject of taxation in Pennsylvania, except the lease of the wharf in that State. Whether that wharf is taxed to the owner or the lessee it matters not, for no question here is involved in such taxation. It is admitted that it could be taxed by the State according to its appraised value. The ferry-boats of the company are registered at the port of Camden in New Jersey, and

according to the decisions in *Hays* v. *The Pacific Mail Steamship Co.,* and in *Morgan* v. *Parham,* they can be taxed only at their home port. According to the decision in the Standard Oil Company case, and by the general law on the subject, the company has no domicil in Pennsylvania, and its capital stock representing its property is held outside of its limits. It is solely, therefore, for the business of the company in landing and receiving passengers at the wharf in Philadelphia that the tax is laid, and that business, as already said, is an essential part of the transportation between the States of New Jersey and Pennsylvania, which is itself inter-State commerce. While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or inter-State commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce. This proposition is supported by many adjudications.

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In *Steamship Co.* v. *Port Wardens,* 6 Wall. 31, it was held that a statute of Louisiana, declaring that the master and wardens of the port of New Orleans should be entitled to demand and receive in addition to other fees, the sum of five dollars for every vessel arriving at that port, whether called on to perform any service or not, was unconstitutional and void, as imposing a burden upon commerce, both inter-State and foreign.

. . . .

In *Reading Railroad Company* v. *Pennsylvania,* sometimes called the case of the *State Freight Tax,* 15 Wall. 232, it was held that the act of the Legislature of Pennsylvania requiring railroad companies to pay the State Treasurer, for the use of the Commonwealth, a tax on each two thousand pounds of freight carried, was unconstitutional and void, so far as it affected commodities transported through the State, or from points without the State to points within the State, or from points within the State to points without it, as being a regulation of inter-State commerce.

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In *Henderson* v. *The Mayor of New York,* 92 U. S. 259, an act of the State of New York requiring the owner or consignee of a vessel arriving at the port of New York to give a bond for every

passenger in a penalty of $300, with two sureties, each a resident and freeholder conditioned to indemnify the Commissioners of Emigration, and every county, city and town in the State, against any expense for the relief or support of the person named in the bond, for four years thereafter, but allowing in commutation of the bond a payment of one dollar and a half for each passenger within twenty-four hours after his landing, and imposing a penalty of $500 for each passenger if such payment were not made within that time, the penalty to be a lien on the vessel, was held to be unconstitutional and void.

. . . .

These cases would seem to be decisive of the character of the business which is the subject of taxation in the present case. Receiving and landing passengers and freight is incident to their transportation. Without both there could be no such thing as their transportation across the river Delaware. The transportation, as to passengers, is not completed until, as said in the Henderson case, they are disembarked at the pier of the city to which they are carried; and, as to freight, until it is landed upon such pier. And all restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.

The cases where a tax or toll upon vessels is allowed to meet the expenses incurred in improving the navigation of waters traversed by them, as by the removal of rocks, the construction of dams and locks to increase the depth of the water and thus extend the line of navigation, or the construction of canals around falls, rest upon a different principle. The tax in such cases is considered merely as compensation for the additional facilities thus provided in the navigation of the waters. *Kellogg* v. *Union Co.* 12 Conn. 7; *Thames Bank* v. *Lowell,* 18 Conn. 500; *McReynolds* v. *Smallhouse,* 8 Bush, 447.

Upon similar grounds, what are termed harbor dues or port charges, exacted by the State from vessels in its harbors, or from their owners, for other than sanitary purposes, are sustained.

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It is true that, from the earliest period in the history of the government, the States have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the States can more advantageously manage such inter-State ferries than the gen-

eral government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress. *Packet Co.* v. *Keokuk,* 95 U. S. 80; *Packet Co.* v. *St. Louis,* 100 U. S. 423; *Vicksburg* v. *Tobin,* 100 U. S. 430; *Packet Co.* v. *Catlettsburg,* 105 U. S. 559; *Transportation Co.* v. *Parkersburg,* 107 U. S. 691.

That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. How conflicting legislation of the two States on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware River. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferry-keepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in the present case is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on.

It follows that upon the case stated the tax imposed upon the ferry company was illegal and void.

The judgment of the Supreme Court of the State of Pennsylvania

must, therefore, be reversed and the case remanded for further proceedings in conformity with this opinion.

Other cases in this collection on the situs of personal property are St. Louis v. The Ferry Co., 11 Wallace (U. S.) 423; Savings etc., Society v. Multnomah Co., 169 U. S. 421; New Orleans v. Stempel, 175 U. S. 309; Kirtland v. Hotchkiss, 100 U. S. 491; Matter of Swift, 137 N. Y. 77; State v. Dalrymple, 70 Md. 294, *supra.*

V. Taxation of Corporate Stock.

BELO V. COMMISSIONERS.

Supreme Court of North Carolina. January, 1880.
82 North Carolina 415.

Smith, C. J. The plaintiff is the owner of three hundred and forty-five shares of the capital stock of the North Carolina railroad company, which have been assessed and charged with an *ad valorem* tax in the manner prescribed by law, and the tax list has been made out and delivered to the defendant, Hill, the sheriff of Forsyth, for collection. This suit is instituted to restrain him and the county commissioners from levying and collecting the tax, on the ground of alleged exemption under the charter of the company, and for the further reason that all proper taxes upon the taxable property of the company are paid by the company.

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The only question then for us to consider is this: As all the property of the company, real and personal, is either given in for taxation and the taxes thereon paid by the company, or is exempt under the act, can the shares in the hands of the stockholders be also assessed and charged as an independent subject of taxation? The question is scarcely open to debate, and we shall only refer to some among the many authorities sustaining the affirmative of the proposition.

In *Gordon* v. *The Appeal Tax Court,* 3 How. (U. S.) 133, Mr. Justice Wayne thus expresses himself: "The franchise is their corporate property, which like any other property, would be taxable, if a price had not been paid for it. The capital stock is another property, corporately associated for the purpose of banking, but in its parts, is the individual property of the stockholders, in the proportion they may own them; and being their individual property,

they may be taxed for it as they may for any other property they may own. . . . . . A franchise for banking is, in every state in the Union, recognized as property. The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government."

In an able opinion of the author of that valuable work on railways, commenting on the law, he says: "We here find the clear recognition of this kind of corporate property, taxable to the corporation, and the shares in the hands of the corporators, distinctly defined as a *fourth species of corporate property, taxable only to the owners or holders.* 1. The capital stock; 2. The corporate property; 3. The franchise of the corporation, all of which is taxable to the corporation; and the shares in the capital stock which are taxable only to the shareholders." 1 Red. Am. R. Cases, 497.

A tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself, or its stock, and may be laid irrespective of any taxation of the corporation where no contract relations forbid it. Cooley Const. Lim., 169. Field on Corp., 521.

A share of stock in a corporation is personal estate and is taxable to the owner thereof, as other personal estate, at the place of his residence. Burroughs Taxation, § 90.

Stock in a corporation is in the nature of a chose in action. It has no locality and of necessity follows the person of the owner. The tax upon it is in the nature of a tax upon income which of necessity is confined to the person of the owner. 1 Potter's Law Corp., § 192.

In Massachusetts it has been decided under a statute of that state that a citizen may be taxed for his stock in a turnpike company in another state. *Great Barrington* v. *Com'rs of Berkshire,* 16 Pick., 572.

In *Van Allen* v. *Assessors,* 3 Wall., 573, it is held that shares in a National bank may be taxed to the holder, although the whole capital is invested in securities of the national government, which an act of congress declares to be exempt from taxation by state authority.

These references are sufficient to show that shares of stock in an incorporated company may be taxed as a distinct species of property, belonging to the holder, independently of the taxation imposed upon the value of the franchise and upon the real and personal estate of the corporation itself.

Has the legislature exercised its power to tax the plaintiff's stock upon its assessed value, and thus secured the uniformity prescribed in the constitution?

The taxes covered by the restraining order were levied in 1878 under the requirements of the act of March 7th, 1877, section 9 of which prescribes what the tax lists shall contain, and in paragraph 6, enumerates the following: "Stock, in national, state and private banks, and stocks in any incorporated company or joint stock association, railroad or canal company, and their estimated value;" and this valuation is charged in the act of raising revenue with the *ad valorem* tax levied, and uniform on property. The stock must be listed in the county and township of the owner's residence, where he resides in the state, as was decided upon the construction of the statute in *Buie* v. *Com'rs of Fayetteville,* 79 N. C., 267.

There is nothing unreasonable in the subjection of this form of property to its share of the common burden of taxation, necessary in the support of government. Income is or may be taxed, unless in the special case forbidden in the constitution, from whatever source derived. Dividends are but net profits distributed among the shareholders, and if they must be taxed, why cannot the stock be taxed from which they proceed?

The subject may be considered in another aspect. The relation of the stockholders to the corporate body, for the purposes of the present enquiry, is very analogous to that of a creditor towards his debtor. The means and resources of the debtor, in connection with the skill, industry and integrity, impart value to his personal obligation, as property possessed by the creditor. It is not pretended that the assessment and taxation of the estate of the former where he may reside, or his estate may be found, should relieve the security, which the latter holds, from liability for its share of the common burden. The same principle, and with equal force, may be applied to the stockholder and the corporation. The latter must bear the taxation imposed upon its property, and this may diminish its distributable profits, but the stockholder cannot, any more than the creditor, claim exemption on this account, for his stock, as distinct and separate property in his own hands.

It must therefore be declared that there is error in the record and the judgment must be reversed, and judgment entered here that the defendants go without day and recover their costs, and it is so ordered.

Error. Reversed.

DYER V. OSBORNE.

Supreme Court of Rhode Island. March, 1876.
11 Rhode Island, 321.

Durfee, C. J. This is an action on the case to recover a tax of $280.00 assessed on the defendant in the Town of Tiverton in the year 1874. The defendant pleads in bar of the action, that in compliance with a notice given by the assessors as prescribed by the statute, Gen. Stat. R. I. chap. 40, § 6, he rendered an account on oath as required by § 7 of that chapter, and his tax was duly assessed by the assessors upon the ratable property and estate in said account mentioned, and was by him promptly paid to the collector of taxes; and he further avers and pleads, "the taxes in the plaintiff's declaration mentioned were assessed upon other property of the defendant, to wit: upon forty shares of the capital stock or corporate property of certain manufacturing corporations, organized under the laws of the Commonwealth of Massachusetts, and located with their said property in the city of Fall River, in the said commonwealth, which said shares were of the par value of $40,000; all of which said capital stock of said corporations was then invested in lands, factory buildings, tenement houses, permanent and movable machinery and stock in process, all located and established in Fall River aforesaid, and said shares in the said corporate property were all taxed to this defendant in said Fall River at their fair market value, and which said tax in said Fall River he duly paid; and this defendant avers that the tax in the said plaintiff's declaration mentioned was assessed on the said shares in the said corporate property, and not upon other and different property or estate of the defendant, and that the said property was not ratable in the said town of Tiverton, and that the said tax mentioned in the plaintiff's declaration and assessed thereon, was and is illegal and void," etc. To this plea the plaintiff demurs.

The declaration describes the defendant as "of Tiverton," and for anything that appears in the plea, he was a citizen or inhabitant of the state, having his domicil in that town. The question, therefore, which is presented by the pleading is, whether a citizen or inhabitant of the state is liable to pay a tax assessed against him in the town of his domicil upon shares of stock which he owns in a manufacturing corporation of another state, he having been taxed and paid the tax on the same shares in such other state.

The question arises under chapters 38 and 39 of the General Stat-

utes. The first section of chapter 38 declares that "all real property in the State, and all personal property belonging to the inhabitants thereof, shall be liable to taxation, unless otherwise specially provided." Section 10 of chapter 39 declares that "personal property, for the purposes of taxation, shall be deemed to include all goods, chattels, debts due from solvent persons, moneys, and effects, wherever they may be; all ships or vessels at home or abroad; all public stocks and securities, except those issued by the government of the United States; all stocks or shares in any bank or banking association; in any turnpike, bridge or other corporation within or without the state, except such as are exempted from taxation by the laws of the state."

The language is plain. It clearly makes the shares of any corporation, whether manufacturing or other, whether without or within the state, liable to taxation, if the owner is an inhabitant of the state, unless such shares are exempted from taxation by the laws of the state. At the time the tax now sued for was assessed, shares in the stock of a manufacturing corporation of another state were not exempted from taxation by the laws of this state. Upon what ground, then, can we hold that the assessment of the tax was illegal and void?

The defendant says the practice of assessors in regard to the taxation of such shares has varied, and that in a majority of the towns such shares have not been taxed to their owners living in this state. A practice under a statute, which has been uniform and long continued, is entitled to weight in construing a statute, if the construction is open to serious doubt. The practice here invoked has not been uniform, and we do not think there can be any serious doubt of the true construction of the statute.

The defendant contends that the assessment, even if within the statute, was illegal and void. He does not point to any specific provision of the Constitution of either the state or the United States which is infringed by the assessment, or by the statute which authorized it; but he plants himself upon the broad ground that the assessment of such a tax is not the exercise of a legitimate power of the state. He has cited numerous cases which he contends support this position.

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The doctrine of these cases appears to be that personal property which is visible and tangible, and which therefore can have a *situs* independent of its owner, may for certain purposes, and especially for taxation, be localized, so to speak, and subjected directly to the

law of the state where it is situated; but that if it be a mere debt or pecuniary obligation, it is incapable of having a *situs* apart from its owner, and therefore can only be taxed to its owner in the state where he resides. We do not find anything in either of the cases which is to the effect that the shareholders of a corporation can only be taxed in the state where the corporation is situated.

The case of *Trowbridge* v. *Com. of Taxes,* 11 N. Y. Supreme Ct. 595, is more nearly in point. It was held in that case that the shares of a foreign corporation, owned in New York, were not property within that state, under the tax law of that state, but simply representatives of capital or property invested in the business of the corporation in the state where it was situated. The case seems to hold that the property of the shareholders is not distinguishable from the property of the corporation, and therefore cannot have a separate *situs* or locality. This may be so within the meaning of the tax law of New York, but ordinarily the property of shareholders is distinguishable from that of the corporation; for whereas the shares are and must be personal estate of the nature of choses in action, the property of the corporation may be real estate or visible and tangible chattels or effects. Angell & Ames on Corp. (7th ed.), §§ 560, 561 and cases cited; *Arnold* v. *Ruggles,* 1 R. I. 167-9.

There are cases which expressly hold that an owner of shares in the stock of a foreign corporation is liable to taxation for such shares in the state where he resides. In *Great Barrington* v. *County Commissioners of Berkshire,* 16 Pick. 572, under a statute subjecting to taxation "shares or property in any incorporated company for a bridge or a turnpike road," it was held that a citizen of Massachusetts was liable to be taxed in that state for his stock in a New York turnpike corporation, notwithstanding the fact that under the law of New York the corporation held the soil of the road in fee. "No exception," said the court, "is made of companies in other states, and the court perceive no reason for raising any by implication."

In *McKeen* v. *The County of Northampton,* 49 Pa. St. 519, a person residing in Pennsylvania and owning 472 shares of stock in a manufacturing corporation of New Jersey, the capital of which was invested in a foundry, machine-shop, and other real estate in New Jersey, and taxed under the laws of that state, was held liable to taxation for his shares in Pennsylvania for state and county purposes. The court say: "The defendant below, being a citizen of this state, it is clear he is subject personally to its power to tax, and that all his property accompanying his person, or falling legiti-

mately within the territorial jurisdiction of the state, is equally within its authority. The interest which an owner of shares has in the stock of a corporation is personal; whithersoever he goes it accompanies him, and when he dies his domicil governs its succession." The court also adverts to the fact that the tax is not assessed upon the shares specifically, but upon the person of their owner, the shares being merely a measure of taxation, and is enforced by warrant against the owner personally or against any property he has whether taxed or not. See also *Whitesell* v. *The County of Northampton*, 49 Pa. St. 526.

It has been held that shares in the stock of a corporation are taxable as such to their owner, though the corporation is itself exempt from taxation by charter; *Union Bank* v. *The State*, 9 Yerg. 490; or though the capital of the corporation is invested wholly or in part in United States bonds, which cannot themselves be taxed. *National Bank* v. *Commonwealth*, 9 Wall. 353; *St. Louis Building & Savings Association* v. *Lightner*, 47 Mo. 393. In *Union Bank* v. *The State*, 9 Yerg. 490, the doctrine of the court was that such a tax must be, from its very nature, a tax *in personam* and not *in rem*. "Bank stock," says the court, "is not a thing in itself capable of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner, and if he be a non-resident, he is beyond the jurisdiction of the state and not subject to her laws."

These cases are to the effect, that shares in the stock of a corporation are in the nature of choses in action, incorporeal, and have no *situs* independently of their owner; and that, consequently, the state has jurisdiction over them to tax them by having jurisdiction over their owner, the tax being in fact a tax upon the owner on account of his ownership, rather than upon the shares themselves. In the light of these cases, we think the defendant's claim, that the tax sued for could not be legally assessed for want of jurisdiction, cannot be sustained.

The plea avers that the defendant has already paid a tax assessed upon the shares in Massachusetts. It is doubtless a hardship for him to pay taxes on the same property in two states. But the Massachusetts tax, even if valid, could not divest this state of its jurisdiction. The laws of Rhode Island are paramount in Rhode Island, and all the inhabitants of the state are subject to them without regard to the laws of any other state. If there be any ground upon which the defendant is entitled to exoneration because of the Massachusetts tax, it is that clause of our Constitution, which declares

that "the burdens of the state ought to be fairly distributed among its citizens," and upon the claim that it is *unfair* to tax him in Rhode Island for property on which he has paid a tax in Massachusetts. We do not think, however, that the tax ought to be declared void under that clause of the Constitution. It would certainly be going too far to hold that a man of wealth, living in Rhode Island, cannot be taxed at all in Rhode Island, if his property is all invested in the stocks of a manufacturing corporation of another state, and there subject to taxation. And if such a man can be taxed at all in Rhode Island, the question of how much, is, within reasonable limits at least, a legislative, not a judicial question.

The defendant's plea will be overruled, and judgment entered for the plaintiff for the amount of the tax with interest.

Demurrer sustained.

There is no objection from the point of view of the United States constitution to taxing, in the hands of shareholders, shares of foreign corporations whose property is taxable in another state, Sturges v. Carter 114 U. S. 511. This is not the rule in New York. People *ex rel.* Trowbridge v. Coms. 4 Hun 559, affirmed in 62 N. Y. 630; People *ex rel.* Brown v. O'Roorke, 31 App. Div. 583-588.

STATE V. BRANIN.

Supreme Court of New Jersey. November, 1852.
3 Zabriskie 484.

The Chief Justice.

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The third exception to the assessment is, that the prosecutor was assessed for stocks held by him in incorporated banks within this state. The ground of this objection is, that the entire capital stock of the banks is subjected to a tax of the one-half of one per cent., and that to subject the same property to a tax in the hands of the stockholders would be in effect double taxation.

Admitting that the taxation be double, and therefore unequal and unjust, the power of the court to interfere and declare it *illegal,* except in cases where it is also in violation of some provision of the constitution, does not seem to be clear.

The authorities are against the exercise of the power, except where it contravenes some constitutional provision. The legislature, from

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some cause, have applied a rule of taxation to banks different from that applied to other corporations. In all other cases where the stock in the hands of the stockholder is taxed, the property of the corporation is exempted. This taxation may, in its operation upon the stockholders in the banks, be unequal, oppressive, and unjust; but, if so, the remedy is not with this court. "The interest, wisdom, and justice of the legislature, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally." *Providence Bank* v. *Billings,* 4 Peters 563; *McCullough* v. *The State of Maryland,* 4 Wheat. 316; *Salem Iron Factory* v. *Danvers,* 10 Mass. 518; *Smith* v. *Burley,* 9 New Hamp. 423.

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The taxation of both corporation and shareholder may however be unconstitutional under some particular state contsitutional provision as e. g. one which requires proportional taxation. See Burke v. Bedlem, 57 Cal. 594. There is, however, no objection from the point of view of the United States constitution to such taxation. Farrington v. Tenn. 95 U. S. 679, 687, but the courts will not presume that it is the intention of the legislature to impose such double taxation. New Orleans v. Houston, 119 U. S. 265, 278; Salem Iron Factory v. Danvers, 98 Mass. 19.

TAPPAN, COLLECTOR V. MERCHANTS NATIONAL BANK.

Supreme Court of the United States. October, 1873.
19 Wallace, 490.

Appeal from the Circuit Court for the Northern District of Illinois, in which court the Merchants' National Bank of Chicago—a bank incorporated under the "Act to provide a National currency," &c., approved June 3, 1864, (13 Stat. at Large, 99), and having its banking house and carrying on its operations of discount and deposit in the town of South Chicago, Cook County, Illinois—filed a bill against one Tappan, collector of county and municipal taxes, in the said town of South Chicago, Cook County, to enjoin his collection of such taxes upon any of the shares of stock in the said bank, assessed under a statute of Illinois, passed June 13, 1867.

. . . .

The court below, ... considering that the law of Illinois laying the tax was in violation of its constitution, decreed an injunction. From that decree this appeal was taken.

The CHIEF JUSTICE delivered the opinion of the court.

We are called on in this case to determine whether the General Assembly of the State of Illinois could, in 1867, provide for the taxation of owners of shares of the capital stock of a National bank in that State, at the place, within the State, where the bank was located, without regard to their places of residence. The statute of Illinois, under the authority of which the taxes complained of were assessed, was passed before the act of Congress, approved February 10, 1863, (15 Stat. at Large, 34) which gave a legislative construction to the words "place where the bank is located, and not elsewhere," as used in section forty-one of the National Banking Act, (13 Id. 112) and permitted the State to determine and direct the manner and place of taxing resident shareholders, but provided that non-residents should be taxed only in the city or town where the bank was located.

The power of taxation by any State is limited to persons, property, or business within its jurisdiction. (State Tax on Foreign-held Bonds, Railroad v. Pennsylvania, 15 Wallace 319.) Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this court and in the courts of Illinois. If the State has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property.

Shares of stock in National banks are personal property. They are made so in express terms by the act of Congress under which such banks are organized. (13 Stat. at Large, § 12.) They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own. This has been done. By section forty-one of the National Banking Act, it is in effect provided that all shares in such banks, held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed under State authority, at the place where the bank is located, and not elsewhere. (13 Stat. at Large, 112.)

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The State, therefore, within which a National bank is situated

has jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and may legislate accordingly.

The State of Illinois, thus having had, in 1867, the right to tax all the shareholders of National banks in that State on account of their shares, it remains to consider at what place or places within the State such taxes could be assessed.

It is conceded that it was within the power of the State to tax the shares of non-resident shareholders at the place where the bank was located, but it is claimed that under the constitution of the State resident shareholders could only be taxed at the places of their residence. We have not been referred to any express provision of the constitution to that effect. There is nothing which in terms prohibits the General Assembly from separating personal property within the State from the person of the owner and locating it at appropriate places for the purposes of taxation, but it is insisted that sections two and five of Article 9 of the Constitution of 1848, which was in force when the act of 1867 was passed, contain an implied prohibition.

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The constitution does not undertake to fix the value of property. Neither does it prescribe any rules by which it shall be fixed. That is left to the General Assembly, for the provision in that respect is, "such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise." The mode and manner in which the persons appointed to make the valuation shall proceed, are left to the discretion of the General Assembly. In fact, the whole machinery of taxation must be contrived and put into operation by the legislative department of the government.

As part of this machinery taxation districts must be created. All property within the district must be taxed by a uniform rate. If property is actually within a district it is but proper that the legislature should provide that it should be listed, valued and assessed there. In fact, the last clause of section five, Article 9, seems to make that a duty, for it provides that the General Assembly shall require that all property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law.

This power of locating personal property for the purpose of taxation without regard to the residence of the owner has often been exercised in Illinois, and sustained by the courts.

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The question is then presented whether the General Assembly, having complete jurisdiction over the person and the property, could separate a bank share from the person of the owner for the purposes of taxation.

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A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts his business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so. If it is not, the General Assembly can rightfully locate his shares there for the purpose of taxation.

But it is said to be a violation of the constitutional rule of uniformity to compel the owner of a bank share to submit to taxation for this part of his property at a place other than his residence, because other residents are taxed for their personal property where they reside. It is a sufficient answer to this proposition to say that all persons owning the same kind of property are taxed as he is taxed. Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph-companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into business, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose, different systems, adjusted with reference to the valuation of different kinds of property are adopted. The courts permit this. Thus, in a case in Illinois, involving the system adopted for the taxation of

bank shares, it was said by the Supreme Court, (*McVeagh* v. *Chicago,* 49 Illinois, 329), "in view of this legislation it must be apparent that a system of taxation for bank shares was designed peculiar to itself and independent of the general revenue laws of the State;" and the authority of the law was sustained and enforced.

Again, it is said that the law in question destroys the uniformity of taxation, because it provides for the collection of the taxes assessed on account of this kind of property in an unusual way. The constitution does not require uniformity in the manner of collection. Uniformity in the assessment is all it demands. When assessed the tax may be collected in the manner the law shall provide; and this may be varied to suit the necessities of each case.

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We have not felt called upon to consider whether the General Assembly could, under the provisions of the act of Congress, provide for the taxation of shareholders at any other place within the State than that in which the bank is located. It is sufficient for the purposes of this case that it might tax them there.

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Decree reversed, and the cause remanded with instructions to proceed

IN CONFORMITY WITH THIS OPINION.

See also New Orleans v. Stempel 175 U. S. 309, *Supra.*

PELTON V. NATIONAL BANK.

Supreme Court of the United States. October, 1879.
101 United States 143.

Mr. Justice MILLER delivered the opinion of the court.

The Commercial National Bank of Cleveland, Ohio, organized under the act of Congress of 1864, creating a national banking system, and by virtue thereof entitled to sue in the circuit courts of the United States, brought this bill in equity to enjoin Pelton, the treasurer of the county of Cuyahoga, in which the city of Cleveland is situate, from collecting a tax alleged to be illegal. . . .

It is . . . . alleged that the tax, as assessed, is greater than that assessed on other moneyed capital in the hands of individuals, citizens of that State, and is, therefore, in conflict with sect. 5219 of the Revised Statutes of the United States.

The decree below was in favor of the complainant, and Pelton appealed to this court.

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The bill states very distinctly that the principle on which the valuation of the shares of the bank for taxation is made "destroys the uniformity of the rule fixed by the Constitution, and violates the obligation thereby imposed to treat all property alike, to the end that all property may bear an equal burden of taxation, and is subversive of the act of Congress allowing such shares to be taxed and intended to protect the owners thereof from greater burdens than were imposed on other moneyed capital at the place where the bank was located." "The necessary effect," it is added, "of the proceedings had in the assessment and levy of the taxes standing against the shareholders of your orator, and now about to be enforced, has been to deprive such shareholders, both in the matter of valuation and equalization, of all benefit of the Constitution and general laws of the State, by which only uniformity in the burden of taxation upon all descriptions of property could be secured, to take from them the security afforded by the limitation in the act of Congress and to impose upon them such excessive exactions as to make the franchises granted by said act comparatively useless." The answer, by way of denial, says that "the taxes mentioned in said complainant's bill, assessed upon the shares of said complainant's banking association, are not taxed at a greater rate than is imposed by the State of Ohio upon other moneyed capital in the hands of individual citizens of said State resident in the city of Cleveland, where said banking association is established and located."

It is thus very clear that the question, whether the taxation of which the bank complained was a tax on its shares greater than that on other moneyed capital invested in Cleveland, was fairly raised by the pleading.

The argument is advanced here which we considered in *People* v. *Weaver* (100 U. S. 539), namely, that if the amount of tax assessed on these bank shares is governed by the same percentage on the valuation as that applied to other moneyed capital, the act of Congress is satisfied, though a principle of valuation is adopted by which inequality and injustice to the owners of them must necessarily result. We do not propose to go over that argument again. The cases were considered together in conference, because they involved that principle. It is sufficient to say that we are quite satisfied that any system of assessment of taxes which exacts from the owner of the shares of a national bank a larger sum in propor-

tion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate within the meaning of the act of Congress.

It is not asserted that any different percentage on the valuation established was applied to these two classes of capital. The bill very clearly shows that the source of the evil was in the unequal valuation.

Taking the answer, with the meaning which the counsel who drew it attaches in argument here to the words, "taxed at a greater rate," it may be said to amount, as a negative pregnant, to an admission that the valuation was unequal, as charged in the bill. Not only so, but it is not denied in argument that while all the personal property in Cleveland, including moneyed capital not invested in banks, was in the assessment valued far below its real worth, say at one-half or less, the shares of the banks, after deducting the real estate of the banks separately taxed, were assessed at their full value, or very near it. The only witness who testified on the subject in this case at all was the auditor of the county of Cuyahoga for the years 1876 and 1877, who had been for many years previously an employe in the auditor's office. He says that, as county auditor, he was a member of the board of county equalization, and acted as such in equalizing during those years the valuation of the shares of the various national and other banks; that the valuation placed on the shares of national banks was higher in proportion than the valuation on other personal property, including banking capital. He says that the matter was talked over in the board, and it was their aim to make the valuation higher, and that their valuation of national bank shares was intentionally higher than the assessed value returned by private banks.

It is necessary here to examine into the mode of assessing the tax as provided in the act of 1877, which related solely to the tax on bank shares. The first section required the cashier of every incorporated bank to make report to the county auditor of the names and residences of its shareholders, the par value of each share, and other facts necessary to enable the auditor to ascertain the value of those shares. The second section required the auditor to assess them at their true value in money, after deducting the real estate, and to transmit the assessment with the report of the auditor to the annual board of equalization of the county in which the bank was located. This board was composed, in cities of the class to which Cleveland belonged, of the county auditor and six citizens appointed by the city council. By the third section this board was

authorized to hear complaints and equalize the valuation of the shares of such banks or banking association, as fixed by him, and with full authority to equalize such shares according to their true value in money. It is to be remembered that the witness whose testimony we have stated was the county auditor who made the first assessment or valuation of these shares, and he was a member of this city board which had authority to equalize that valuation. It was of this city board he was speaking when he said that they had assessed bank shares generally higher than other personal property, including, of course other moneyed capital; and that they had assessed the shares of the national banks higher than private banks, and that it was their aim to do so. It is also important to observe in reference to another view of the question, presently to be considered, that this discrimination was neither an accident or a mistake, nor a rule applied only to this bank, but that it was a principle deliberately adopted to govern their action in the valuation of all the shares of national banks, and was applied to them all without exception. It appears by the testimony of this witness that there were seven national banks in the city of Cleveland whose shares, as equalized by the city board for taxation, amounted to $3,236,500, to all of which this rule of valuation, making their taxes much higher than on other moneyed capital, was applied, and that this was done for two years at least, and probably many more.

This act of 1877, however, provided another board of equalization, composed of the auditor of state, treasurer of state, and attorney-general, to whom all the assessments of bank shares made by the county and city boards were to be referred, and to whom no other property was referred, for an equalization which included the whole State. This board could do no more than increase or diminish the valuation of such shares for each county and city, so as to make them conform to some standard of equality among themselves which that board might adopt. But the result of their action must be such that it did not increase or diminish the aggregate value of the amount returned by the county auditors of the whole State more than $100,000.

This board, for the taxes now in contest, increased the valuation of the shares of the complainant $250,000 above the sum of $912,000, at which it had been assessed by the county board, and it increased the valuation of the shares of all the national banks of Cleveland from the sum of $3,236,500 to $4,046,045.

It is thus seen that the auditor and the city board of equalization valued these shares higher in proportion to other moneyed cap-

ital in Cleveland to an extent which the witness does not state, but which may be supposed to be thirty per cent, as it is shown to be in comparison with real estate; and the State board added about one-fourth to that, so that the tax on the national bank shares, against which relief is sought in this suit, is between fifty and sixty per cent on its real value greater than on other moneyed capital, and, therefore, to that extent forbidden by the act of Congress.

For this injustice and this violation of the law there ought to be some remedy. To the specific one of an injunction by a suit in chancery, and, indeed, to any remedy by the bank, many objections are raised; but all of them have been considered and overruled in the case of *Cummings* v. *National Bank* (*infra,* p. 153), which was argued at the same time this case was, it is unnecessary to repeat here what is said in that case.

As the complainant has paid so much of this tax as was not in violation of the act of Congress, we think the decree of the Circuit Court enjoining the collection of the remainder was right.

Decree affirmed.

Mr. Chief Justice Waite dissented.

A higher rate of taxation may not be imposed on national bank stock than on other moneyed capital except where the state is restrained by valid contract entered into by it e. g. with a state bank, Leonburger v. Rouse, 9 Wallace (U. S.) 468, and except where partial exemption of certain property has been made to avoid double taxation. Hepburn v. School Directors, 23 Wallace (U. S.) 480; Adams v. Nashville, 95 U. S. 19. But "other moneyed capital" does not include trust company stock where the trust company is not engaged in banking business. Mercantile National Bank v. Mayor 121 U. S. 138. See also Mercantile National Bank v. New York, 172 N. Y. 35.

Further if deduction for debt from assessment for personal property is permitted, such deduction must be permitted in case of assessment for national bank stock. People v. Weaver, 100 U. S. 539.

Finally. States may tax national banks only in the way permitted by the act of Congress. Owensboro National Bank v. Owensboro 173 U. S. 664.

VI. Assessment to Owner.

STATE EX REL. ROE V. WILLISTON.

Supreme Court of Wisconsin. January, 1866.
20 Wisconsin 228.

In 1853, a tract of land, 14½ rods wide and 64 rods deep, in the city of Janesville, was sold and conveyed to J. M. Smith, and an adjoining tract of the same depth, and eight rods wide, was sold and conveyed to Mrs. Julia S. B. Smith, wife of said J. M. Smith; and the whole was thereafter known as "Smith's ten acres," and was described as ten acres in the assessment roll. In March, 1860, the tract first mentioned was sold for $19.36, and conveyed to *Charles S. Roe.* In 1861, the assessors of said city went upon the tract belonging to Mrs. Smith, and were informed by Mr. Smith of the sale and conveyance of the other tract to *Roe,* and had the boundary between the tracts pointed out to them, and were requested to assess the taxes on each of said tracts to the proper person, and promised so to do. The whole ten acres were again listed, however, as a single tract, and the name of J. M. Smith put opposite, as that of the owner. This fact did not become known to Mr. or Mrs. Smith until the following winter, when the city treasurer refused to receive any portion of the taxes charged against the ten acres unless Smith or his wife would pay the whole thereof. On the 20th of January, 1862, said taxes being unpaid, the whole ten acres were sold for the same to the city, and the certificate of sale assigned in July following to *Charles S. Roe.* In 1864, Mrs. Smith died, leaving two minor children, who were still living at the time of the filing of this application. On the 10th of January, 1865, Mr. Smith applied to the city treasurer for the purpose of redeeming the land so owned by Mrs. Smith; and received from him a certificate of redemption upon paying to him $6.88, with interest and fees. After the 20th of January, 1865, *Roe* called upon the city clerk, *Williston,* tendered his certificate of sale, and the proper fee, etc., and demanded a deed for the ten acres, which was refused on the ground that the above named certificate of redemption of a part of said land had been filed with said clerk. The application was for a *mandamus* to compel the issue of such a deed; and the petitioner states, *inter alia,* that the part of said land so attempted to be redeemed, owing to the improvement existing thereon at the time of the levying and assessing of said taxes of 1861, was worth more

than two-thirds of the value of the whole of said land; that there were also other taxes and assessments due and unpaid upon that part of the land at the time of such alleged redemption, which were not then paid; and insists that such pretended redemption was both illegal and inequitable.

DOWNER, J. The writ of *mandamus* must be denied. The charter of the city of Janesville provides, in substance (see sec. 15, ch. 3, and sec. 3, ch. 7), that the assessors shall be governed by the provisions of law relating to assessors in towns in making out the assessment rolls, so far as they are not inconsistent with the charter. The assessor in towns was at the time of the assessment in question, and still is, required to set opposite to each tract of land in the assessment roll *the name of the owner, if known*; if not known, the word *"unknown."* R. S. 1858, ch. 18 secs. 17 and 23; Laws of 1859, ch. 167, sec. 23; Laws of 1860, ch. 386, sec. 23. It appears that the ten acres mentioned in the petition of the relator belonged at the time of assessment in 1861, three and 18-100 acres to Mrs. Smith, and the remainder to *Roe*, the relator; that the husband of Mrs. Smith informed the assessor what portion of the ten acres was owned by his wife, and what part was owned by *Roe*, pointing out to him the division line, and requesting him to assess the same, each part separately to its owner. He promised so to do, but failed to do it, and assessed the whole tract together, and put down on the roll the name of J. M. Smith as the owner of the whole. Blackwell on Tax Tit. page 175, says: "When it is shown that the name of the original owner was known to the officer, and omitted, the list will be held invalid; because the statutes expressly declare that the name of the owner shall be inserted when it can be done. Where an entire tract of land is assessed to one who owns only a portion of it, the listing is illegal." He cites *Baker* v. *Blake*. 36 Maine, 433; *Proprietors of Cardigan* v. *Page,* 6. N. H., 182; *Nelson* v. *Pierce,* id., 194; 1 Foster, 400; *Merritt* v. *Thompson,* 13 Ill., 716. We do not see why the assessment roll as to the ten acres, and all subsequent proceedings, are not void. It is true, there is in the charter provision that the deed, when once executed, shall be conclusive evidence of certain facts and *prima facie* evidence of others. Should we compel the execution of the deed, the purchaser might be protected, or at least be in a better position than he is now. But courts refuse to exercise this high power to give strength and validity to a title which is clearly defective on the merits. *The People* v. *The Mayor, etc., of New York,* 10 Wend., 393. The relator holds a tax certificate on ten acres of land, of which he now owns six

72-100 acres, and did own it at the time of the assessment and sale, and on which he ought to have paid the taxes, and he ought also to have seen that it was properly described in the assessment roll. He now demands a deed of the whole ten acres, and refuses the redemption money paid by the owner of the smaller portion, and maintains that she could not, under the provisions of the city charter, redeem a part, but must redeem the whole ten acres, if any. He has neither a legal nor an equitable right to such a deed.

By the Court.—The motion for a peremptory writ of *mandamus* is denied, with costs against the relator.

A motion for a rehearing in this cause was denied at the January term, 1866.

CRUGER V. DOUGHERTY.

Court of Appeals of New York. November, 1870.
43 New York, 107.

Appeal from a judgment of the late General Term of the Supreme Court in the sixth judicial district, affirming judgment on a verdict directed for the plaintiff at the circuit.

By the Court—PECKHAM, J.. . . .. The point is presented, whether this alleged tax sale was void, by reason of failure to comply with the directions of the statute in imposing the tax, and in the proceedings thereafter.

The statute authorizing this tax, makes it "the duty of the assessors of each ward and town, while engaged in ascertaining the taxable property therein, by diligent inquiry, to ascertain the amount of rents reserved in any leases in fee, or for one or more lives, for a term of years, exceeding twenty-one years, and chargeable upon lands within such town or ward, which rents shall be assessed to the person or persons, entitled to receive the same, as personal estate, which it is hereby declared to be, for the purpose of taxation under this act." (S. L., 1846, p. 466, § 1.)

The second section requires the board of supervisors to assess such taxes "upon the person or persons, entitled to receive such rents within the town or ward, where the lands upon which such rents are reserved, are situated, in the same manner and to the same extent as any personal estate of the inhabitants of such town."

. . . .

In assessing the tax, under which this lot was sold by the sheriff,

the assessors put it down in their roll as follows: "The Kortright patent, John Kortright and others legal heirs of John Kortright, late of the city of New York, deceased, or their heirs or assigns, for rent reserved in the town of Kortright, in the county of Delaware, subject to taxation, estimated at a principal sum, which at a legal rate of interest will produce an income equal in amount to such rents. $26,195; $632.41, personal."

. . . .

The first objection to these taxes is, that the assessors have not "assessed them upon the person or persons entitled to receive them," as they are required to do by the statute.

The assessment must be made in this case upon these persons, "in the same manner, and to the same extent as any personal estate of the inhabitants of such town."

The statute as to assessment for personal estate requires the name of the person taxed to be put down in the roll in one column, and the full value of his personal property in another. (1 R. S. 390, § 9.) It is not denied that the names should be put down, but it is insisted that they were sufficiently inserted on the tax roll. The statute in this particular must be substantially complied with. Its entire omission would be fatal to the validity of the tax.

Where the assessment of a tax for land was made against a person neither "owner or occupant" of the land as required by the statute, the assessment has been held to be absolutely void. (*Whitney* v. *Thomas,* 23 N. Y., 281, at 284.) This, it must be remembered, is an assessment for personal property against these parties.

Is the statement made here any better than if none had been made as to the names of the persons assessed? Only one person is named in the assessment roll, "John Kortright," and he had been dead five years before this assessment was made. He was a son of John Kortright, once owner of the patent, who died in 1810.

It cannot be pretended that this was sufficient to name him who had been dead five years. The other designations are mere alternative classes. "Other legal heirs of John Kortright, deceased, or their heirs or assigns."

It is said that the assessors acted judicially, and that this may be likened to a judgment. Such a judgment against one of these classes would scarcely be claimed to be valid, especially a judgment entered without process or notice to any one.

It is, perhaps, not necessary to say, that the persons should literally be named in all cases; but they clearly should be as distinctly identified, as if named.

In *Wheeler* v. *Anthony* (10 Wend., 346), it was held that a district school tax assessed upon "the widow and heirs of Zopher S. Wheeler, deceased," imposed upon them as owners and occupants of a farm, was properly imposed in that form. It was said by the court in that case, that "when property is owned by a single individual, it is proper and necessary that the name of such individual should be inserted in the tax bill; but when a farm is owned or possessed by a mercantile or other firm, the assessment to such firm would answer the same purpose as well as writing out each name."

If this were true, in that case, as to such a tax for a farm, a tax can scarcely be imposed for personal property against tenants in common in any such form, as the staute authorizes no such tax.

If tenants in common of personal property were taxed as a body for so much personality, it would afford no opportunity to any one of them to swear it off on account of debts that he might owe.

The statute says that the roll must state, first, "the names of all the taxable inhabitants, and fourth, the full value of the personal property owned by such person, after deducting the just debts owing by him." (1 R. S., 390, § 9.)

Such a taxation to a body of tenants in common complies with neither of these provisions, and affords no opportunity to an individual to have his tax corrected. A firm is not a person, like a corporation. Hence the tax as to personal property should be upon each individual, including his interest in the firm, as in all other taxable personal property. But if the tax be valid upon a firm, it does not follow that it would be valid when imposed upon a body of tenants in common, in personality, as a body.

. . . .

It is also urged that these persons are estopped from questioning this tax now, because they have been assessed in this form for eighteen years prior to this assessment, and have always paid it.

The payment of a tax for any number of years without legal proceedings, will not give validity to such proceedings when they are questioned, if taken without authority of law. One might almost as well defend an action for an assault and battery, by pleading that he had beaten the plaintiff every year for many years, and that this was the first time the plaintiff had ever complained.

. . . .

The county treasurer seemed to think the assessment illegal, and in issuing his warrant, he cut off two classes named in the assessment, and issued it against the only person named, who had been dead for years, and others, heirs, etc.

If the assessment were void, the county treasurer could scarcely make it valid by his warrant.

It is insisted that the assessors, in making this assessment, acted judicially; that they had jurisdiction of the subject-matter, the rents, and of the persons entitled to receive them, and although they committed errors, yet their action was not void, but only voidable. The liability of assessors is not here in question, and it is perhaps not necessary to discuss it.

But, if the purchaser, in this case, were a defendant claiming to hold this property under these proceedings, he would fail. He would fail even upon the ground assumed by the defense.

Surely it will not do to say, that because there are rents reserved in the town, and they are receivable by some one, therefore whatever the assessors may do in relation to an assessment in such case is valid, whether it be in substantial compliance with the statute or not. The assessment must be made to some one. It is not sufficient to say generally to the persons entitled to receive the rents. They must be named and indicated. Until that is done, the assessors have passed no specific judgment, have really exercised no jurisdiction.

It is a rule well established by authority, that when one claims to hold another's property under statutory proceedings, as under a sale for taxes, he must show that every material provision designed for the security of the persons taxed, or their protection, has been substantially complied with, otherwise the claim will fail. In fact the rule is generally laid down with much more strictness.

. . . .

For the reasons above stated, we think the purchaser under this assessment took no title.

There are other defects insisted upon not deemed necessary to consider.

The judgment is affirmed.

All the judges concurring judgment affirmed.

An assessment of land in the alternative as "'to unknown owners and to all owners and claimants known and unknown" is void. Brady v. Dowden 59 Cal. 51; Shimmin v. Inman 26 Me. 228. But where an assessment to unknown owners is permitted by the statute if an assessment, is thus made it will be presumed that the name of the owner is unknown to the assessors. Himmellmann v. Steiner 38 Cal. 178. The assessor is not obliged to determine the ownership. Hughes v. Reis, 40 Cal. 261. In New York land may be assessed to the owner or occupant. Whitney v. Thomas 23 N. Y. 285.

Pol code 3441
101 Cal 543.

VAN VOORHIS V. BUDD.

Supreme Court of New York General Term May, 1868.
39 Barbour 479.

Appeal from a judgment of the county court of Dutchess county, affirming the judgment of a justice of the peace. The plaintiff sued to recover damages for the seizure and sale of certain personal property; and the defendant justified the taking, as town collector, under a tax warrant issued to him as such. The plaintiff recovered a judgment before the justice.

By the Court, BROWN, J. This action is brought against the defendant to recover damages for the seizure and sale of a horse, the property of the plaintiff. The defendant justifies under a tax warrant, issued to him as collector of the town of Fishkill, in the county of Dutchess, for the year 1861.

The tax is assessed upon the roll to Henry D. Van Voorhis, while the real name of the plaintiff is William H. Van Voorhis. The proof upon the trial, however, showed that the plaintiff was also known in the town as Henry Van Voorhis, and he was the person intended to be charged with the payment of the tax. Levi S. Van Kleek, a witness for the defendant, testified that he was one of the assessors of the town of Fishkill during the year 1861, and made the assessment against the plaintiff to Henry D. Van Voorhis. He saw him and spoke to him about the assessment, and knew him by the name of Henry Van Voorhis. His name was upon the assessment roll for the year previous as Henry D. Van Voorhis, and the witness took the name from that roll. The plaintiff himself was examined as a witness, and said he was more frequently called Henry than William Henry Van Voorhis.

The assessors are, by diligent inquiry, to be made between certain times named in the statute, to ascertain the names of all the taxable inhabitants in their respective towns or wards, and also all the taxable property real or personal within the same, and from these they are to prepare the assessment rolls in the manner prescribed. When the collector receives the tax warrant he is required to call at least once upon the person taxed and demand payment of the tax charged to him on his property. If the person refuse or neglect to make payment the collector shall levy the same by distress and sale of the goods and chattels of the person who ought to pay the same. It is evident that this law cannot be executed as to the names of persons charged with the payment of taxes with the same pre-

cision and exactness formerly observed in regard to the names of persons made parties defendants in actions at law. In these latter proceedings, when the defendant pleaded his misnomer in abatement he was bound to furnish the plaintiff with his real name and swear to the truth of the plea, and the plaintiff might have leave to amend his declaration or institute a new action, and the remedy as well as the right of action was preserved to him, notwithstanding the error in the defendant's name. In the assessment of a tax no such result would ensue. The statute provides no other means than the diligence and inquiries of the assessors to ascertain the real names of the tax payers; and if an error is made it is fatal to the recovery of the tax. Reasonable certainty then is all that can or should be required. If the party defendant was as well known by the name given in the declaration as by his baptismal name, that was regarded as a good replication to a plea of misnomer in abatement. And so in the assessment of the tax in question, if the plaintiff was known by the name of Henry Van Voorhis, that was a sufficient justification for charging him with the payment of his share of the public taxes by that name. This court has held, in the case of *Wheeler* v. *Anthony,* (10 Wend. 346,) that a tax assessed to the widow and heirs of Zophar S. Wheeler deceased, when they actually owned and occupied the farm charged, was a sufficient compliance with the directions of the statute to justify the collector in executing the warrant by the seizure and sale of a cow to satisfy the tax. In respect to the presence of the letter D. between the words Henry and Van Voorhis upon the tax roll, it is to be regarded as surplusage, upon the well known rule that the law recognizes but one christian name. (See *Franklin and others* v. *Talmadge,* 5 Johns. 84; *Rosevelt* v. *Gardner,* 2 Cowen 463.) There was no proof offered upon the trial to show that there was any other person in the town of Fishkill known by the name of Henry Van Voorhis, or Henry D. Van Voorhis, to whom the charge might have been referred; so that there could be no confusion and no uncertainty in regard to the person whose duty it was to pay the tax.

The judgments in the justice's and in the county court should be reversed, with costs.

Initials also, if identical with those of the owner of the property, are sufficient and the christian name need not be used. Douglass v. Daken 46 Cal. 51.

In case of corporations the strictness of the rule as to name is not so great. People v. Sierra Buttes Quartz (Mining) Co., 39 Cal. 511; Farnsworth (Mfg.) Co. v. Rand 65 Me. 22.

TYLER V. INHABITANTS OF HARDWICK.

Supreme Judicial Court of Massachusetts, October, 1843.
6 Metcalf 470.

SHAW, C. J. This action is brought to recover back money alleged to have been paid under compulsion, as a town tax. The objection is, that the plaintiff's christian name was not inserted in the valuation, nor in the list and warrant committed to the collector, but only his surname of Tyler.

The question arising from the facts in the case is, whether the plaintiff was rightfully required by the collector to pay the tax, or whether, as a tax unlawfully levied, he was wrongfully required to pay it, and can recover it back in this action.

Whilst, on the one hand, it is important to the security of the citizen, that as much regularity and uniformity as is practicable should be maintained in the system of direct taxation, and many laws directory to the public officers have been framed with a view to the attainment of that object; it is also important that, as far as practicable, all persons liable to taxation should pay their just proportion of the public charges, and not escape by means of slight mistakes and frivolous objections.

One of the statutes, to which we have been referred, is designed to promote this object, by providing that a tax shall not be avoided by an error or mistake in the name, if in fact the party whose name was mistaken be liable to taxation, and was the person intended by the assessors to be taxed. Rev. St. c. 8, § 5. The provision is this: "If, in the assessors' lists, or in their warrant and list committed to the collectors, there shall be any error in the name of any person taxed, the tax assessed to him may, notwithstanding such error, be collected of the person intended to be taxed, provided he is taxable, and can be identified by the assessors."

The only question then is, whether this clause was intended to apply to a case where the error in the name exists as well in the valuation as in the assessors' warrant to the collector.

It was argued, that all which was intended is, that when the name is right in the valuation, but erroneously transcribed into the warrant, the tax shall not be avoided, as the warrant can be corrected by the valuation. But we think the statute was intended to go much farther, and to provide for a mistake in both. The words "assessor's lists," in this clause, stand for the valuation, and "their warrant and list" are described as that which is "committed to the

collectors." The statute is plain and explicit, and covers all cases of error in the name, and was intended, we think, to apply to a case where the name is mistaken by omitting, as well as by adding or by misnaming. The only things required are, that the person shall be liable to taxation, and be in fact the person intended to be taxed under such designation. . . . These facts must of necessity be proved by evidence *aliunde.* The fact of the identity of the party, and the intention of the assessors, must in general be proved by them.

Such seems to us to be the true construction of the statute; and though it may sometimes lead to consequences, operating hardly upon individuals, it will be attended practically with little danger, and with less evil than the escape of persons from paying a just share of the tax, on account of formal errors and mistakes. It is not to be overlooked that such errors will, in most cases, arise from the default of the tax-paying inhabitant himself, who fails to perform the duty, required by law, of giving in his name and list to the assessors.

Upon this view of the statute, the court are of opinion, that the evidence should have been received, and that notwithstanding the alleged error in not inserting the plaintiff's christian name, he was liable to the tax, and compellable to pay it, if the facts were proved, the evidence of which was offered; and therefore, that the verdict must be set aside, and a new trial had.

But where there is no such statute, assessment to surname alone is not good. Crawford v. Schmidt, 47 Cal. 617.

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vid. Sub VII

VII. Assessment of Separate Parcels.

COUNTY COMMISSIONERS V. UNION MINING CO.

Court of Appeals of Maryland. October, 1883.
61 Maryland 547.

Stone, J., delivered the opinion of the court.

The bill in this case is for an injunction to restrain the County Commissioners of Allegany County and the tax collector from selling the property of the appellee, who insists that a portion of the tax levied upon its property is illegal and void. A preliminary injunction was granted by the Court below, and from this order an appeal has been taken.

The appellee assigns several reasons why the assessment is illegal and void.

1st. Because the property of the appellee so taxed, consists of several tracts of non-adjoining land lying in different parts of the county, and known by distinctive names, but the appellee was taxed for a number of acres in gross, without giving the name or number of acres in any one tract.

. . . .

The County Commissioners have the exclusive power to levy and collect taxes, and in some cases to value and assess property in the manner pointed out by law. While they constitute a tribunal with special and limited statutory powers, yet acting within the scope of such powers their action is conclusive, and cannot be reviewed by a Court of Equity. The collection of taxes will not be interfered with or restrained by a Court of Equity for mere *irregularities* in their proceedings, or for any hardship that may result from their collection. It is only when the tax itself is clearly illegal, or the tribunal imposing it has clearly exceeded its powers, or the rights of the tax-payers have been violated, that the interposition of the special remedy by injunction can be successfully invoked, and only then when no appellate tribunal has been created with power to remedy the wrong. The bill in this case is a long one, and rather argumentative than specific in some of its statements.

. . . .

But there are some objections urged by the appellee that require a more extended notice. One of these is the fact alleged in the bill that the lands of the appellee consisted of half a dozen or more separate and distinct tracts of land, each having a well known name, and lying in different parts of the county, and having different values, while the only assessment made is upon 4245 acres of land which is valued at $10 per acre, making the whole valuation $42,-450. This raises the question whether the law imposes upon the Commissioners the duty of assessing each tract separately, and whether a failure so to do is such an infringement of the rights of the appellee, as he is entitled to have redressed by a Court of Equity.

The lands of the appellee were required to be valued and assessed under the general assessment law of 1876. and we must presume that they were assessed and returned to the Commissioners according to law. No taxes however were then paid upon these lands, but the stock of the corporation representing all its property, and including these lands were taxed. The Act of 1878, chap. 178, altered

the law in that respect, and made the lands of this and other corporations, liable to direct taxation. That Act provided that the president or other proper officer of any corporation, that might own real property, should furnish to the County Commissioners "a true statement of such real property situate or located in such county; and such real property shall be valued and assessed by said County Commissioners to the incorporated institution owning the same."

This appears to have been done, and the County Commissioners of Allegany proceeded to value and assess the real estate of the appellee.

It will be seen from this Act, that the president or other proper officer is required to furnish a *true statement* of the real property, and the Commissioners are then to value and assess it. If the appellee furnished the statement of its lands, that is now found on the books of the Commissioners, and which has been before referred to, then the *appellee* cannot complain of the assessment in gross. If the president of the appellee corporation merely described the lands as 4245 acres of land, in the statement he furnished the commissioners, then the appellee is estopped from saying that the assessment is improper and void, because such assessment is the consequence of its own act. But if the president did furnish in detail a proper statement, showing the names, number of acres, and location of the several tracts, then it was manifest error in the Commissioners to change it, and make the assessment that they did.

It is true that the Act of 1878, ch. 178, does not prescribe any particular mode of assessment, but being *in pari materia* with the Act of 1876, ch. 260, the general assessment law, they should be taken together, and we may conclude that the Legislature intended that the rules they had laid down for the assessment of *all* the real property should be observed, when the County Commissioners were called upon to re-assess a part of it.

The Act of 1876, ch. 260, sec. 17, the general assessment law, points out, with great particularity, the mode and the manner of assessing real estate. It says: "In valuing real estate in any county in this State, except in a city in such county, the assessors shall specify so far as may be practicable, the *name or names of the tracts or parcels of land so valued and the number of acres or quantity in each, and the value per acre.*"

There are many obvious reasons why this particularity is required. The owner of several tracts of land, lying in different localities, and of different values, is entitled to the judgment of the assessors in the first instance, and of the County Commissioners, if they alter

the first assessment, of the value of each tract separately. It is a valuable and important right to the owner, as it enables him to compare the taxation of his own with adjoining property, and see that no injustice is done him by overestimates.

The community is also entitled to this knowledge, which is often an important factor in the sale and transfer of real estate. The law recognizes this right very distinctly in sec. 22 of Art. 11 of the Revised Code, that expressly requires the clerk of the County Commissioners to keep an *accurate* account of all property, and the valuation thereof, which shall be open to inspection by the public, *without fee or reward.*

If we examine the Act as to real property *in a city,* we find still greater particularity required. The number of front feet, the depth of the lot, the street upon which it lies, and if a house is upon the lot, even the number of the house is required.

If in the face of all this particularity the County Commissioners undertake to *average* the value of half a dozen different tracts of land, lying in widely differing localities, they violate the *mode and manner* of the assessment required by law.

It is no answer for the Commissioners to say, that the amount of tax that the owner has to pay is not increased by the mode of average that they have adopted, and that he would have to pay the same tax if each tract were re-valued separately. It is the absolute right of the owner to have them taxed separately, and this lumping re-assessment is a direct violation of that right.

Judge Cooley says: "When two parcels are owned by the same person, if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceedings. It cannot be held in any case that it is unimportant to the tax-payer whether this requirement is complied with or not. Indeed, it is made solely for *his benefit*; it being wholly immaterial, so far as the interest of the State is concerned, whether separate estates are or are not separately assessed. And where a requirement has for its sole object the benefit of the tax-payer, the necessity of a compliance with it cannot be made to depend upon the circumstances of a particular case, and the opinion of a court or jury regarding the importance of obedience to it in that instance. That method of construing statutes would abolish all certainty." *Cooley on Taxation,* 280.

As we have said before, we think the power to assess given by the Act of 1878 to the Commissioners, means an assessment such

as was prescribed by the Act of 1876, and it was clearly an error in the Commissioners to assess it in a different manner.

We are strengthened in this view by the fact that the Act of 1878, ch. 178, sec. 150, gives the County Commissioners the power annually to correct any assessment. That section enacts:

"And if the real estate or other property shall, from any cause, have increased or diminished largely and materially in value since the last levy, they shall correct, alter, and amend the assessment of the same, so as to conform to its present value."

The true construction of this section is that it gives the Commissioners the power to alter the assessment *as made by the assessors,* if in their judgment it had largely increased or diminished. It does not authorize them to change the *mode and manner* in which the property was required by law to be assessed.

But as the bill leaves it in doubt whether the real estate of the appellee was assessed in gross, by the act of the appellee in furnishing the statement, we cannot make a decisive order on that point.

. . . .

Where land is platted as city lots, assessment by the acre as before is bad. Grace v. McBee, 23 Kan. 379. See Jennings v. Collins, 99 Mass. 29, as to what is a parcel, where it is held that mere division by owner for purposes of sale will not make assessment of such parcels necessary.

BROWN V. HAYS.

Supreme Court of Pennsylvania. October, 1870.
66 Pennsylvania State 229.

Agnew, J.—This case has leading features which, being determined, will render it unnecessary to consider the assignments of error in detail. The first and most important fact which, to a great extent, rules the case is, that lot No. 4023 of 1026 acres is one tract of land, and belongs to a single ownership. It all lies in Polk township, except an insignificant parcel caused by a slight deviation from the northern boundary of the tract in running the line of Polk township, leaving 16 acres in a narrow triangle lying within the township of Heath. Until 1859 it had all been assessed and taxed in Polk township, and Hays, the plaintiff, had paid the taxes accordingly. In 1859 the assessment was returned originally as 1026 acres in Polk township; but by some action of the county commis-

sioners not clearly explained, the assessment had been altered to 726 acres in that township. In the same year the duplicate and supervisors' return for Heath township exhibits an assessment of 300 acres of No. 4023 in Heath township. It was on this return the treasurer's sale took place in 1860, under which the defendants claimed. Joseph Henderson, the clerk of the commissioners, is unable to state at whose instance the change from 1026 to 726 acres in Polk township was made—all he can say is, he thinks it was on the representation of the assessor, or someone else in whom the commissioners had confidence. The strong probability is, it was caused by the incorrect, indeed false assessment made for Heath township; and unless it was done by way of revision by the board of assessors it was irregular. If the testimony of Henderson, the clerk, proves anything, it is that this alteration in the assessment of 4023 in Polk township was not done at the instance of the board of revision; for he "don't know (he says) that there was any board of revision about it." The 2d section of the Act of 3d April 1804 directs all unseated lands "to be valued and appraised as other property; and both the 8th section of the Act of 1799 (3 Smith's Laws 395), and the 2d and 4th sections of the revised Act of 15th April 1834 commit to the proper assessor the duty of taking the account, and making the return and valuation of the taxable property within this township. In *Respublica* v. *Deaves,* 3 Yeates 465, it was held that under the Act of 1799 the valuation of the assessors is binding on the county commissioners; and by a parity of reason, the return of a tract which fixes its identity and liability to taxation is more so. The 6th section of the Act of 15th April 1834 expressly provides for the assembling of the assessors, on a day to be appointed by the commissioners, to make the returns of the several assessments, when it shall be the duty of the assessors to point out errors, and if the errors be established, the commissioners shall correct the returns accordingly.

This being the legal system for the correction of errors, in the assessment, it is an important fact that in consequence of Hays's residence in a remote part of the state, and his paying the taxes of 1859 by the hand of another not familiar with his lands, he had no notice of the assessment in Heath township. Having always before paid his taxes for his lands as lying in Polk township, he had no reason to suppose that his land was taxed elsewhere. His payment to the treasurer of all the taxes assessed in Polk township unquestionably operated to discharge all the land lying in that township from sale. The payment was for the taxes of lot No. 4023 in Polk township

and not merely for 726 acres of land. The assessment was made by the number of the lot and also in the name of the original warantee; indicating clearly the intent to assess the lot as a whole, and as a single ownership.

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The judgment is affirmed.

WOODSIDE V. WILSON.

Supreme Court of Pennsylvania. 1858.
32 Pennsylvania State, 52.

THOMPSON, J.—A sale of unseated land for taxes, which have been actually assessed, and which have remained due and unpaid "for one whole year," will pass the title, although assessed in a wrong name or by a wrong number, if otherwise designated and capable of identification. The reason for this is, the recognized principle, that it is the land and not the owner, which is chargeable and to be charged with the tax. It must, however, be susceptible of identification, as the land assessed, otherwise the sale would be void. The bond, an essential part, would, without any designation, be invalid, as being too vague to furnish a lien on the land, and thus the sale would be inoperative. But, identification is a question, arising on the evidence, for the jury; and what will be sufficient to satisfy them, that the land sold was the land charged with the tax, will support the sale. This is conclusively settled in *Stewart* v. *Shoenfelt*, 13 S. & R. 360; *Strauch* v. *Shoemaker,* 1 W. & S. 174; *Burns* v. *Lyon,* 4 W. 363; *Thompson* v. *Fisher,* 6 W. & S. 520; *Dunden* v. *Snodgrass,* 6 Harris 151; *Russel* v. *Werntz,* 12 Harris 337; *Miller* v. *Hale,* 2 Casey 436, and other cases. It was said in *Laird* v. *Heister,* 12 Harris 463, "that the tax-books in the office of the commissioners, and treasurer, were not intended to give notice of the liability of the land for taxes, but merely the mode in which tax accounts are kept." This seems a perfectly legitimate conclusion, deducible from the principle asserted in *Dunden* v. *Snodgrass,* and other cases, that the designation of the land will be sufficient, if it afford the means of identification, and do not positively mislead the owner. It will not do to assume that such a thing may not occur; but, in case of an owner anxious and willing to pay his taxes, it is difficult to conceive of. For if, when he examines the assess-

ment books, and finds that the description or designation of the land is defective,—so much so, as to render uncertain or doubtful what is really the assessment of the land sought for, he can relieve himself of all difficulty on that score, by procuring it to be assessed in the office of the commissioners, by a proper description; and then a payment of the tax so assessed, relieves the land from all danger. The tax being thus paid, a sale by any other description will amount to nothing, as the duty is discharged, and the land, for the time being, free from any charge.

. . . .

The land in controversy was a part of donation tract No. 152, 8th district. The plaintiff below claimed it by virtue of a treasurer's deed, dated August 12th 1852, on a sale made June 14th 1852, for the taxes of 1850-51. The land, 100 acres, had been sold, by John Reynolds, to one Eleazer Rockwell, in 1840; who retained it and paid the taxes on it, up to 1850, when he relinquished the land to Reynolds, who immediately sold the land in controversy, to one Wright, under whom the plaintiffs in error claim. The land was assessed and sold as No. 1302, and in the name of E. Rockwell. The assessors proved that it was the land in controversy, that was assessed with the taxes, and the land which Rockwell had of Reynolds. The assessments for a number of years prior to 1850, being given in evidence, it appeared to have some times been assessed by the correct number, 152, sometimes as 1502, and 1302, E. Rockwell; and a part to John Reynolds as 1502. Upon this state of facts, the court below charged, in answer to several points of the defendants, "that marks and surveys are not the exclusive and only indices by which it (the land) may be designated;" and "that it is not essentially necessary that a donation tract should be assessed by its distinctive number, provided it has other names or means by which it may be known;" and submitted the facts, on the question of the identity of the land, as that on which the assessment was made, to the jury. We think the learned judge was right in so charging and submitting the facts. The land was known in the assessment-books, and in the neighbourhood by the name of Rockwell, the person in whose name it was assessed and sold, and who had been in fact an owner and taxpayer on it for ten years. This fact would necessarily give it a designation as his land, and Mr. Reynolds, or a purchaser from him, would most naturally expect to find it taxed in that name. They could not claim—for it would be contrary to all reason—that such a designation could mislead them. It was a good designation; for the tax of 1850, was in all probability, assessed, while Rockwell

was still owner of it; and to continue it in the same name, unless the owner chose to change it to his own, was an every day occurrence. It was a sufficient designation of the tract, to have corrected any errors induced by the number. It is worthy of note, in this connection, that the number, if correctly given, would have been of little value as a designation, as there were several subdivisions of the tract, all entitled to claim the same number as a designation.

But the number as given, could not have misled anyone, at all acquainted with or interested in the land. It was in fact an impossible one. That tract, 1302, lay entirely in a different district—the land in question being situate in the 8th district, and No. 1302 in the 7th; a seated tract, with which E. Rockwell's name had no connexion whatever. We attribute, however, to donation numbers, as a designation in assessments, no more virtue than to warrant numbers. *Dunden* v. *Snodgrass* was of this latter kind. The true number of the warrant was 624; it was assessed and sold as No. 18. There being other means of designation in the case, this court held the error in the number of no account. And for the same reason, we so hold in this case. The law was correctly given to the jury, and there is no error in the second, third and fourth assignments.

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On consideration of the whole case we are of opinion that this judgment should be affirmed.

Judgment affirmed.

Land office abbreviations are sufficient description. Association v. Wagoner, 33 Ind. 51. City lots may be described in accordance with city tax plan. Janesville v. Markoe, 18 Wis. 350. But where statute says land must be described by metes and bounds this method must be followed. People v. Cone, 48 Cal. 427.

BOSWORTH V. DANZIEN.

Supreme Court of California. April, 1864.
25 California 297.

By the Court, SHAFTER, J.:

This is an action of ejectment brought to recover the possession of certain lands situate in the city and county of San Francisco. The case was tried by the Court, and the plaintiff appeals from the judgment rendered against him, and from an order denying his motion for a new trial.

In the description of the premises, as set forth in the complaint,

the initial point and the first two courses therefrom are described as follows: "Commencing at the northeasterly corner of Center and Guerrero streets, running thence easterly on Center street ninety feet; thence at right angles northerly," etc.

The plaintiff claimed title to the premises by virtue of a tax deed executed to him under the Revenue Act of 1857. When the deed was offered in evidence, it was objected to by the defendants as inadmissible, "because the deed does not describe the land by metes and bounds, and the description is fatally defective in calling for wrong streets, and the lines cannot be made to meet."

The deed was admitted by the court, subject to the objections; and from the findings, we must conclude that the court in the end excluded the deed as being void upon its face. The error assigned relates to the correctness of that ruling.

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The deed recites that the land purchased by the plaintiff at the tax sale was a part of a larger tract "assessed, levied upon, and advertised," and then proceeds to describe the part purchased by metes and bounds; and on comparing the description with the description given in the complaint of the premises demanded we find them to agree in every particular.

The deed also recites the description of the larger tract of land as given in the assessment roll and advertisement. The point of beginning and the first course and distance therefrom, are described as follows: "Lot commencing on the northeasterly corner of Center and Guerrero streets, thence easterly on Corbett street, two hundred feet, thence at right angles northerly," etc.

It will be observed that the description in the assessment roll begins at the northeasterly corner of Center and Guerrero streets and runs thence easterly on Corbett street two hundred feet, and that in the description of the land sold and conveyed, the same line is described as beginning at the same point, running easterly therefrom on Center street.

The Court has found in effect that a line drawn easterly, that is, due east, (1 Johns. 156; 3 Caines, 293,) from the corner named, would run along Center street in fact, and furthermore it is impossible that it should be otherwise—the corner, the direction of the streets toward the cardinal points, and their subsequent intersection at right angles being given.

We here assume the true point of the respondent's objection to the validity of the deed to be, that the description of the south line of the tract assessed is contradictory in fact, and, not being true

to the whole extent of the terms used, that the assessment is utterly void as matter of law. The counsel of the appellant, meeting the case in this aspect of it, seeks to defeat this consequence on the ground that the false call in the description of the property as listed may be rejected as surplusage.

1. Where, in case of a deed voluntarily executed by the owner of land, it appears upon applying the instrument to its subject matter, the description in it is true in part, but not true in every particular, so much of the description as is false will be rejected, and the instrument will take effect if a sufficient description remains to ascertain its application. *Falsa demonstratio non nocet cum de corpore constat. Smith* v. *Galloway,* 5 B. & Ald. 43, 51. In such case, evidence of *res gestae* will be received for the purpose of ascertaining the intention of the parties, and giving to it a complete effect and operation.

But tax proceedings are *in invitum.* The land owner intends nothing. The Government, acting after its own methods and through its own agents, seeks to enforce the collection of a tax which it has imposed upon the citizen; and it follows that if a false description in a tax deed or assessment roll can be rejected as surplusage, it cannot be for the reason that it is necessary that it should be so dealt with in order that the intention of the parties may be fulfilled. It does not, however, follow that a false call occurring in an assessment roll is to be retained to the entire overthrow of the tax title, because it cannot be rejected for the particular reason above stated.

It not unfrequently happens that a case arises, not in all respects within the beneficial operation of one rule of law, but which may be manifestly within the saving operation of another, going upon broader conditions. The maxim, *"Ut res magis valeat quam pereat,"* is a canon with reference to which not only contracts and wills are to be construed, but statutes also—passed, as they are, without any direct cooperation or assent on the part of the citizen. The spirit of the maxim is, that nothing should be destroyed merely for the sake of destruction. We have not, by our own examination, been able to find any adjudged case in which it has been held that a false call in an assessment roll, advertisement, or tax deed, necessarily vitiates a tax title. The rule as given in *Tallman* v. *White,* 2 N. Y. 66, is as follows: "An assessment of land is fatally defective and void if it contains such a falsity in the designation or description of the parcel assessed as might probably mislead the owner, and prevent him from ascertaining by the notices that his

land was to be sold or redeemed. Such mistake or falsity defeats one of the obvious and just purposes of the statute—that of giving to the owner an opportunity of preventing the sale by paying the tax." We accept the above decision, not more on the authority of the Court by which it was pronounced, than on our entire conviction that it is correct in principle.

The test, then, to which every false call occurring in the course of tax proceedings is to be subjected is this: Has it probably had the effect to mislead the landowner in relation to the land assessed, advertised and sold?

In the case at bar, the description in the assessment roll begins at a point fixed with entire precision, and runs therefrom due east two hundred feet. The superadded description of that line—"along Corbett street"—was not, in our judgment, calculated to mislead the landowner, and for the manifest reason that it was impossible that the call should be true. The call was not only false, but absurd, and that, too, in the light of facts appearing on the face of the general description of the corner and line.

Judgment reversed, and new trial ordered.

Personal property need not generally be described in an assessment. Its amount is all that need be stated unless a statute provides otherwise. People v. Home Ins. Co., 29 Cal. 536; People v. Holaday, 25 Cal. 305.

VIII. Method of Valuation.

HERSEY V. BOARD OF SUPERVISORS.

Supreme Court of Wisconsin. January, 1875.
37 Wisconsin 75.

Cole, J. This is an appeal from an order denying a motion to dissolve a temporary injunction restraining the county treasurer from selling lands for delinquent taxes. The motion to dissolve stated that it would be founded on the original injunction order, complaint and answer on file. On the hearing of the motion, the plaintiffs were permitted to read, against the objection of the defendants, affidavits in support of the allegations of the complaint.

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The complaint alleges, that certain rules were adopted by the assessors in 1872, for the assessment of real estate in Barron county,

and that the same rules were followed by the assessor and board of review in making the assessment for the year 1873, upon which the tax in question was levied. These rules are as follows: First. Pine on first class driving streams assessed at $2 per M. within the limits of two miles hauling. Second. Pine on such streams of more than two miles hauling at $1.50 per M. Third. Pine on second class driving streams, as Moose Ear and other streams mentioned, at $1.50 per M. within two miles, and $1.00 per M. beyond. Fourth. Pine on fourth class waters, head of Yellow river, north of Bear Lake, at 50 cents per M. Fifth. Lands entered for farm lands (wild) at from $2.50 to $10 per acre, according to locality; and cultivated, at $6 per acre. Sixth. Cut lands according to inspectors' reports, at 12½ cents per acre.

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It sufficiently appears from this averment, as well as from other admissions in the answer, that these rules were made the basis of the assessment for the year 1873; and assuming, as we may well do, that they were adopted with no fraudulent intent, and with no purpose of favoring any owner of real estate, the question then arises, Was the assessment valid which was made in conformity to them? It appears to us that it was not.

The statute directs the manner in which real estate shall be listed or valued for taxation. "Real property shall be valued by the assessor from actual view, at the full value which could ordinarily be obtained therefor at private sale, and which the assessor shall believe the owner, if he desires to sell, would accept in full payment. In determining the value, the assessors shall consider, as to each piece, its advantage or disadvantage of location, quality of soil, quantity and quality of standing timber, water privileges, mines, minerals, quarries, or other valuable deposits known to be available therein, and all buildings, fixed machinery and improvements of every description thereon, and their value." Sec. 16, ch. 130, Laws of 1868. The listing and valuation are the foundation of all the subsequent proceedings; and this provision prescribes the manner in which they shall be made, with the manifest purpose that the tax levied upon each tract shall be relatively according to its real value. The assessor is required to make the valuation from actual view, and he is called upon to exercise his judgment with reference to each tract, its advantage or disadvantage of location, the quality of the soil, the quantity and quality of standing timber; in short; he is to consider all the elements which enter into and constitute its value. These are the plain, obvious rules and principles upon

which the statute contemplates that the valuation shall be made. By the rules in question, these statutory principles were utterly ignored and disregarded. An arbitrary classification was applied to the real estate. It is conceded that the lands were generally wild, pine lands. The standing pine on what is called first class driving streams was assessed at $2 per M. within the limits of two miles, regardless of the advantage or disadvantage of its location up or down the stream and wholly ignoring the element or quality in the standing timber. In respect to pine on such streams, which had to be hauled more than two miles, the same arbitrary value was affixed, regardless of its quality or location from the source or mouth of the stream. The same remarks apply to the other classification in the rules. The real estate is valued solely with reference to the quantity of pine timber standing upon it, without taking into account the quality of it, its location up or down the stream, or the character of the soil, or those other elements which determine the value of land, and which the statute says the assessor shall consider and regard in making the valuation. That a valuation thus made would necessarily operate unjustly and unequally, seems to us too plain for discussion. True, it is alleged in the answer that it was only practicable to make a fair and equitable valuation of the real estate under these rules, which is equivalent to saying that the law upon the subject cannot be complied with. But if no valuation can be made as the statute requires, we fail to see upon what ground the tax can be sustained. A valuation is essential to lay the foundation for the tax; and if no legal valuation was practicable, it follows that any tax based wholly upon an unauthorized valuation would be illegal and void. The allegation is a *felo de se*.

But it is said by the counsel for the defendants, that even if the rules above quoted were absolutely followed and strictly pursued by the assessor in making the valuation, yet, if they were honestly adopted as expressive of the judgment of the assessor, there being no question of fraudulent intent, a court of equity would not say the assessment was void. But how can a court of equity pronounce an assessment valid which is in plain violation of law? Real estate must be valued in the manner and upon the principles prescribed by the statute. The assessor may make a mistake in the valuation while honestly attempting to execute the law. Errors of judgment, inequalities in valuation, will intervene in all proceedings of this character. It might not be practicable for the assessor to go over every foot of ground and thus, from "actual view" of every part of a tract, determine its true market value, at the time of the assess-

ment. But there should be an attempt to substantially comply with the law. Here we feel warranted in assuming, upon the admissions in the answer, that the law was disregarded, the assessor adopting for the guidance of his judgment rules which not only departed from the statutory requirements, but which could not fail in their operation to defeat a fair and just valuation. That such must have been the necessary effect of the rules upon the valuation, seems to us perfectly obvious. As remarked by counsel for the plaintiffs, the idea that standing pine, just two miles from a stream, should be assessed at $2 per M., though of a poor quality, while excellent timber on an adjoining tract, a little further from the stream, is assessed at $1.50 per M., confounds all notions of justice and equality.

That the assessment made under the rules, and the taxes levied upon the lands of the plaintiffs, were void, and that a court of equity will interfere to restrain the sale, follows from the decisions in *Hamilton* v. *The City of Fond du Lac,* 25 Wis. 490, and *The Milwaukee Iron Co.* v. *The Town of Hubbard,* 29 id. 51. Those cases seem to be directly in point upon that position.

By the Court.—The order of the circuit court is affirmed.

STATE V. JESSE PLATT.

Supreme Court of New Jersey. June, 1853.
24 New Jersey Law. 108.

This was a *certiorari,* prosecuted by John B. Coles and others, devisees of John B. Coles, deceased, to review and correct the assessment of taxes made by the assessors of Jersey City, in the year 1851, upon the lands of the prosecutors.

ELMER, J. . . . . . .

But it is objected that the value placed on this property is imaginary and exorbitant. There are about three thousand lots, and the value exceeds a million dollars. If rightly assessed as lots, as I think they were, they were of course to be valued as lots, and such was the intention of the charter. The city is rapidly extending, and every improvement made in it tends directly to enhance the value of the lots, so that in justice they ought to contribute their fair proportion of those expenses which make the city desirable as a residence and quicken its growth. If overvalued, the remedy of the owners was by an appeal to the commissioners select-

ed for the purpose of revising the estimate of the assessors, and this remedy they availed themselves of. It is certainly shown that the present income of the property bears no comparison to the interest of the money at which it is valued. But the income is not the criterion; and it is not shown that they are valued beyond the true, full, fair value of them, certainly not so far beyond it as to show such partiality and misconduct in the officers as would justify us in holding the assessment to be wholly void. The lots were not valued so high as the price at which they are held, and are not valued higher than other property in the city in a similar condition.

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Another objection to this taxation is, that when it was made the churches within the limits of the city were not in terms exempted from taxation by the charter, and, although shown to be of the aggregate value of one hundred thousand dollars, they were not assessed. Meeting houses and school houses, although not formally exempted by the tax laws in force prior to 1851, were seldom if ever assessed in any part of the state. This omission was so obviously proper, and so entirely in accordance with the public sentiment, that it universally prevailed, and was in fact a contemporaneous construction of the laws this court would probably have sanctioned, had the question been formally raised. When the new system was adopted, the exemption was for the first time expressly enacted; and although not contained in the charter of Jersey City, I do not think the omission to tax the churches such an illegality as ought to render the whole assessment void.

It would be a novel and dangerous doctrine to hold, that if the assessors happen to omit some property really taxable, the assessment is thereby necessarily void, so that no taxes can be collected. There is, perhaps, scarcely a district in the state where this does not happen, to a greater or less extent, almost every year. It is undoubtedly the duty of the assessor to include all the property liable to be taxed; but unless it be in cases involving a palpable and greatly injurious disregard or misconstruction of plain requirements of the law from the necessity of the case, this is a matter which must be left to his own vigilance. In the case of *The State* v. *Branin,* this court held that an omission to assess a poll-tax vitiated the whole assessment; but in that case there was not a mere omission to assess some particular individuals or property, there was a flagrant misconstruction of the law, affecting every taxable inhabitant, very different in its character from the case before us. In the case of *Williams* v. *School District,* 21 Pick. 75, the Supreme

Court of Massachusetts held that an omission would not invalidate an assessment. The same principle was affirmed in the case of *George* v. *Inhabitants, &c.,* 6 Metc. 497.

The only valid objection I find to this assessment is, that the assessors included in it the sum of $2,458.98 for losses and contingencies. Fifteen hundred dollars were ordered to be assessed, by the ordinance of the council, for contingent expenses, as by the charter they were authorized. But this additional sum is illegal. It must, therefore, be referred to a commissioner to ascertain what is the prosecutor's proportion of this sum, and to that extent the assessment must be set aside, and as to all the rest affirmed.

PEOPLE EX REL. TRUST CO. V. COLEMAN ET AL.

Court of Appeals of New York. June, 1891.
126 New York, 433.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of October, 1890, which affirmed an order of Special Term dismissing a writ of certiorari to review an assessment of the relator's capital for the year 1889.

The relator is a corporation organized under a special act of the legislature of 1864 (Chap. 316, Laws of 1864), doing business as a trust company in the city of New York. On the second Monday in January, 1889, it furnished to the commissioners of taxes and assessment a detailed statement of its assets and liabilities which was duly sworn to, and claimed that all its capital stock and surplus, being invested in United States securities, was exempt. The commissioners held that the capital stock, the actual value of which they were to assess, was the shares and they ascertained such value by multiplying the nominal capital by the market price of the shares and deducted therefrom ten per cent of the nominal capital, the assessed value of the real estate and the investments in United States securities.

FINCH, J. The relator has been assessed upon an "actual value" of its capital stock derived entirely from the market value of its shares. These are selling at the large premium of something over five hundred dollars for each share of one hundred dollars, and the assessors have concededly taken that valuation, or the principal part thereof, as the "actual value" of the company's stock liable to tax-

ation, instead of its own proved and established value. The relator challenges the assessment, and through all the proceedings has persistently raised and pressed the inquiry, not so much as to the mode or manner of ascertaining value, but rather as to what is the precise thing to be valued, whether the capital stock of the company or the capital stock held in shares by the corporators. If these are the same, or, in any sense, equivalents, either might be valued without substantial error, but if they are not such, we must determine which is to be valued before we can solve the problem of how to value it.

Now, it is certain that the two things are neither identical nor equivalents. The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property, or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise and the good will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation; the other to the corporators. The franchise of the company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock; while the same franchise does enter into and form part, and a very essential part, of the shareholder's capital stock. While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both, but that surplus is no part of the company's capital stock, and, therefore, is not itself capital stock. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and the franchise in addition. So that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus, its franchise; but these three things, several in the ownership of the company, are united in the ownership of the shareholders. The share stock covers, embraces, represents all three in their totality, for it is a business photograph of all the corporate possessions and possibilities. A company also may have

no surplus, but, on the contrary, a deficiency which works an impairment of its capital stock. Its actual value is then less than its nominal or par value, while yet the share stock, strengthened by hope of the future and the support of earnings, may be worth its par, or even more. And thus the two things—the company's capital stock and the shareholder's capital stock—are essentially and in every material respect different. They differ in their character, in their elements, in their ownership and in their values. How important and vital the difference is, became evident in the effort by the state authorities to tax the property on the national banks. The effort failed, and yet the share stock in the ownership of individuals was held to be taxable as against them. The corporation and its property were shielded, but the shareholders and their property were taxed.

Now some degree of confusion and trouble have come in because these two different things are denominated alike capital stock, making the expression sometimes ambiguous. It is the important and decisive phrase in the law of 1857, under which the assessment here resisted was made, and requires of us to determine at the outset in which sense it was used. The section reads thus: "The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment-roll, or shall have been exempted by law, together with its surplus profits or reserved funds exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value and taxed in the same manner as the other real and personal estate of the county."

There are reasons in abundance for the conclusion that by the phrase "capital stock" the statute means not the share stock, but the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise, and the chief factor in its safety. One ample reason is derived from the fact that the tax is assessed against the corporation and upon its property, and not against the shareholders, and so upon their property. In theory every tax is charged against some person, natural or artificial, resident or non-resident, known or unknown. It is assessed not upon property irrespective of ownership, but against persons in respect to their property (23 N. Y. 215), and effects not merely a lien, but also a personal liability. On the assessment-rolls in this case appeared the name of the relator as the person as-

sessed, and that amount of the tax became a charge against it. Of course, it could only be assessed and taxed in respect to its own property, that which in its corporate character it owned and possessed, and so it follows inevitably that the statute concerns the company's capital stock, that is, its real and actual capital, and not in any respect the share stock which it does not own and whose possessors have not been assessed.

Another reason is found in those terms of the statute which include and exclude respectively specific kinds or classes of property in the corporate ownership. Thus the assessment is to be laid not merely upon the capital stock of the corporation, but also upon its surplus. No such explicit direction was necessary, except upon the assumption that by the words "capital stock" was meant simply "capital," which would not include surplus, and so required that it be subjected by name to the valuation. If the share stock was meant its value would include surplus and make its specification not only needless but confusing. But while the statute includes surplus by specific mention, it excludes franchise by omitting it. The omission of franchise is emphasized by the careful inclusion of surplus. It is fully and definitely settled that the tax imposed by the statute is not upon the franchise. *People* v. *Commrs. of Taxes,* 2 Black. 620. But if that be so, it is not upon the share stock, for that represents the value of the corporate franchise as a part of the total of the corporate property. And so, both by what it specifically includes and silently excludes, the statute itself informs us that by "capital stock" it means and intends the company's actual capital paid in and possessed, and not at all or in any sense the share stock.

The same thing becomes apparent from a study of the whole line of legislation which culminated in the law of 1857. It was traced in detail upon the argument with great industry and wealth of illustration. We have verified it by traveling over the same track, and without taking pains to reproduce it, may assert the general result which it discloses and select out one or more illustrations. The investigation shows that the word "capital" and the phrase "capital stock" are used interchangeably and synonymously, and where the latter phrase occurs there is almost always something in the statute which stamps and labels it as referring to the actual capital of the company. Thus the law of 1825 (Chap. 262), after providing for the taxation of all persons owning or possessing property, proceeds to declare that corporations shall be deemed persons for the purposes of the act, and requires them to furnish a statement of the

amount of "capital" actually paid in; and then, referring to turnpike and bridge companies, requires them to state "the amount of capital stock actually paid in or secured to be paid in." Both clauses refer to the same assets or fund, naming it indiscriminately "capital" and "capital stock." Again, in the law of 1825 (Chap. 254) the assessors, after putting the corporation by name on the assessment-roll, are required to add the amount "of its capital stock paid in or secured to be paid in," and to designate how much of it is in real and how much in personal property, and so no doubt is left that by "capital stock" was meant simply the "capital" possessed in cash or invested in securities or real estate.

The illustrations might be multiplied and fortified by reference to numerous acts relating to the formation or management of manufacturing, railroad, business and telegraph companies in which the two forms of expression are used indiscriminately and as convertible terms; but I think quite enough has been said to require unhesitating assent to the proposition that, under the law of 1857, the thing to be taxed is the capital of the company and not the shares of the stockholders.

Indeed, I should feel bound to apologize for arguing what seems to me so simple and plain a proposition, were it not for the fact that it has been largely ignored by assessors and not always clearly kept in mind by the courts, and but for the further fact that the right to adopt as the taxable valuation the value of the shares, totally disregarding the value of the company's capital, has been asserted in this case, maintained by the courts below, and claimed to be fully justified by very much which we ourselves have decided or said.

Before examining the cases in detail to see whether they hamper our freedom of judgment upon the question presented, I think it safe and also prudent to assert three things as applicable generally and to all the cases alike. First, this court has never decided, either by a direct determination or by necessary implication, that the law of 1857 authorizes the imposition of a tax upon anything else than the actual capital of the corporations, together with their surplus; second, that the precise question whether the capital of the companies or the share stock of the shareholders forms the basis of valuation and the thing to be assessed, has not been heretofore formally and distinctly presented; and third, that all seemingly erroneous expressions of opinion are corrected at once when they are referred to the permissible conditions under which the value of the share stock in the market may be referred to, not as the thing

to be valued and assessed, but as an aid or help in discovering the value of the other and different thing which is to be valued and assessed. Keeping these general principles in mind we now recur to the cases.

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The final case to be examined is *People ex rel. Knickerbocker Fire Ins. Co.* v. *Coleman* (107 N. Y. 541). It appeared that the relator's stock at par amounted to $210,000 while its share stock was selling below par and for ninety cents on the dollar. But the assessors did not assess the share stock, nor take its value as the test of capital, and so showing no surplus but a deficiency. On the contrary, they went to the Company's own books for information and there found not a deficiency but a surplus, and deducting from the aggregate of capital and surplus the assessed value of the real estate, United States stock and the exempted ten per cent, they found a taxable balance of about $25,000. The company resisted. Their counsel argued that the "assessment should not exceed the market value of the capital stock, less statutory exemptions." (p. 542.) By capital stock he plainly meant the share stock which was selling at ninety. The counsel for the assessors insisted that "the market value of shares of stock of the corporation is not the proper and sole test of the value of the corporate capital." On that issue we sustained the assessment. In so doing we necessarily decided that capital, swollen by surplus or diminished by losses, was the subject to be valued and taxed and not the share stock; and that when the actual value of capital and surplus was known and established, in this case by the party's own books, no reference to the value of the shares could be permitted to lessen the valuation. The case, therefore, was correctly decided and in entire accord with the doctrine which I have herein advocated.

But the opinion contained a statement which has been cited as conclusive by the General Term and also on the argument at our bar, and to which I now refer because it opens the way to the final point of the discussion and to a fact which accounts for and explains most of the references to the value of share stock which are seemingly of a doubtful character. The language was this: "The law does not prescribe how the actual value of the capital stock of a corporation shall be ascertained. That is left to the judgment of the assessors, and in appraising the actual value they have a right to resort to all the tests and measures of value which men ordinarily adopt for business purposes in estimating and measuring values of property. They may take into account the business of the corpora-

tion, its property, the value of its actual assets, the amount and nature of its present and contingent liabilities, the amount of its dividends and the market value of its shares of stock in the hands of individuals." Now I do not desire to withdraw in any degree the concurrence which I yielded to this statement when the case was decided, but it must not be wrested from its application to the facts then before the court and be made to do duty on a different and broader field. The corporation was a fire insurance company with a wide range of contingent liabilities. It had made no statement to the assessors and had left them to their own resources. Where that is so what are the officers to do? Necessarily they must resort to such means as remain and are accessible, and in that emergency they may "look at," "take into account," consider the market value of the shares. That is something very different from assessing the share stock or making its value the conclusive measure of capital and surplus. Such reference is simply the result of necessity, a resort to the poorest means of information and to the most deceptive and treacherous test, because the better means or truer test cannot be obtained. How unreliable the test of share value may be through the effect of gambling, false rumors, scarce money and panics, Judge Comstock describes in his opinion to which I have already referred; and yet there are cases in which it furnishes some aid to the judgment in the absence of accurate knowledge. It is such cases that the courts have had in mind when justifying a reference to the stock market, and not those in which the amount and value of capital and surplus was fully and faithfully disclosed. And so I think the authorities either fairly permit or fully justify the conclusions which I have reached and which may be stated with reasonable accuracy thus: First, the subject of valuation and assessment is never the share stock, but always the company's capital and surplus. Second, such capital and surplus must be assessed at its own value, and when that is correctly known and ascertained, no other value can be substituted for it. Third, where its amount and value are undisclosed and unknown the assessors may consider the market value of the share stock and the general condition of the company as indicative of surplus or deficiency and of the probable amount of either. Fourth, they may further resort to such means of information when the amount of capital and surplus is disclosed but the assessors have sufficient reason to disbelieve the statement, and such reason is founded upon facts established by competent proof.

If these conclusions are correct it will follow that the assessment

complained of should be canceled. The corporation presented to the assessors a sworn statement of its assets and liabilities. If it be true, there was nothing subject to assessment. But its truth is not questioned, and there is not the least reason to doubt it. The assessors did not doubt it; they merely deemed it immaterial, and so testified when examined. In other words, knowing with certainty the value of one thing, they claimed the right to affix to it the larger value of a different thing. Authorized only to tax against the company its capital and surplus, they assumed the right practically to tax it for the share stock held by individuals. They have not in terms claimed that the share stock is the subject of taxation, nor has the counsel who represented them on the argument, but both have maintained and defended what is the exact and complete equivalent. The right asserted is a discretion in the assessors at their free will to assess corporations upon and at the value of their capital and surplus, or upon and at the value of the share stock independently of established facts and whenever they please. The law gives them no such discretion. How it has been exercised and how destructively to the rights of the taxpayers may be seen by comparing the action in this case with that in one of the cases which we have reviewed. Where the share stock was selling at ninety, and so below par, the assessors refused to take that value and went to the company's books in search of a larger one, which they found and adopted. Here, where the actual value of capital and surplus is established so that they frankly admit the fact, they calmly disregard it and fly to the larger value of the share stock. The statute has given them no such right. They are not lawless rovers, wandering among corporations at will, but regular officers bound by discipline and controlled by the law, and whose discretion exists within fixed and definite limits.

It is said, and it is true, that large masses of personal property escape taxation, and the owners are persistent and artful and not over nice in their efforts to avoid a just share of the public burdens, and so we should uphold faithful assessors in every attempt to do their full duty. I think this court will not be unmindful of the situation, but before all we must first ascertain and then obey the law. If in that process evils result or are disclosed, the remedy must be sought elsewhere.

It follows that the judgment and order of the General and of the Special Term should be reversed and the assessment against the relator vacated and canceled, without costs.

All concur, except PECKHAM, J., not voting.

Judgment reversed.

PEOPLE EX REL. MANHATTAN RAILWAY CO. V. BARKER.

Court of Appeals of New York. June, 1895.
146 New York, 304.

Cross-appeals from order of the General Term of the Supreme Court in the first judicial department, made April 11, 1895, which reversed an order of Special Term vacating and setting aside an assessment of the relator's capital stock for taxation as personal property for the year 1894, and affirmed the proceedings of the commissioners of taxes and assessments.

The facts, so far as material, are stated in the opinion.

HAIGHT, J. On the 8th day of January, 1894, the commissioners of taxes and assessments of the city of New York assessed the relator, the Manhattan Railway Company, for its personal property at the sum of $30,000,000. In the month of April thereafter the relator filed a statement upon one of the blank forms furnished by the department of taxes and assessments showing its condition on the second Monday of January, 1894. An examination of the treasurer of the company was thereupon had by the commissioners, who then reduced the assessment and fixed it at the sum of $17,860,712. The relator thereupon procured a writ of certiorari directed to the tax commissioners, commanding them to make return of the proceedings had before them to the Special Term of the Supreme Court in order that a review might be had before that court. Upon the returns so made by the commissioners a hearing was had by the court in November, 1894, upon which an order was entered vacating the assessment. Upon an appeal to the General Term this order was reversed and the assessment as made reinstated.

. . . .

In 1893 some controversy arose over the amount of the assessment of the relator's personal property, which resulted in Mr. Davies, the attorney for the relator, addressing a letter to the commissioners, in which he states that Mr. Gould had authorized him to say that if the assessment did not exceed $12,500,000 they would acquiesce. The statement made in 1893 has some slight variations from that made in 1894, but is substantially the same with the exception that the amount of surplus reported in 1894 is nearly $1,000,000 in excess of that of 1893, so that if the commissioners in fixing the amount of the assessment for 1894 acted upon the statement made in 1893 as compared with that made in 1894, and the letter addressed to them by Mr. Davies, they could not well have increased the assessment in 1894 more than $1,000,000 or thereabouts, the amount of the increase of the

surplus earnings of the company. This would have made in round numbers $13,500,000. It was, however, stated upon the argument by their counsel that a very different method was adopted in reaching the amount of the assessment; that in the statement furnished to the commissioners the *assessed value* of the real estate had been given at $7,323,200, and no mention had been made as to its actual value, and that the commissioners were, therefore, left to judge for themselves as to the actual value, and that that was arrived at in the following manner:

Capital stock		$29,925,200
Bonded indebtedness		21,163,035
Surplus		5,326,432
Gross assets		$56.414,667
DEDUCTIONS.		
Assessed value of real estate	$7,323,200	
Stock in other companies	7,075,200	
Mortgaged indebtedness	21,163,035	
10 per cent of the capital stock	2,992,520	
Total	$38,553,955	$38,553,955
Which deducted from gross assets, leaves amount assessable		$17,860,712
The actual value of the real estate as assessed is thus ascertained from the relator's statement by deducting from the gross assets		56,414,667
The amount of its personal property, consisting of rolling stock, cash, tools, etc.	$3,748,315	
Stock in other companies	7,075,200	
		$10,823,315
Leaving as the actual value of the real estate		$45,591,352

We cannot adopt or approve of this method of ascertaining the value of the relator's personal property or of the actual value of its real estate. The method is erroneous and incorrect for various reasons. Under the statute the capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll or shall have been exempted by law, together with its surplus profits or reserve funds exceeding ten per cent of its capital after deducting the assessed value of its real estate and of shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this State, shall be assessed at its *actual value* and taxed in the same manner as other

personal and real estate of the county (Laws of 1857, chap. 456, sec. 3). It is the actual value of its capital stock and not the market value of its share stock that is to be assessed; in other words, it is its actual tangible personal property and not its franchises. Other statutes provide for the taxing of its real estate and franchises. (*People ex rel. The Union Trust Co.* v. *Coleman,* 126 N. Y. 433.) The real property of the relator is located in the city of New York under the eye and subject to the inspection of the commissioners. Under the Revised Statutes they are required to assess it at its just and full value as they would appraise the same in payment of a just debt due from a solvent debtor. (1 R. S. 393, § 17.) And under the Consolidation Act for the city of New York it shall be assessed "at the sum for which such property under ordinary circumstances would sell." The value of property is determined by what it can be bought and sold for, and there can be no doubt but that these various expressions used in the statutes all are intended to mean the *actual value* of the property. The commissioners are sworn officers, and as such, in absence of evidence to the contrary, are presumed to have done their duty. They have assessed the real estate at $7,323,200, and yet, under the method presented by their counsel for ascertaining the value of the relator's personal property, they now estimate the actual value of the real estate to be $45,591,-352. We are aware that it is generally understood that in many localities throughout the State assessors, in violation of their duties, assess the real estate in their localities at a sum less than its actual value, but in the absence of evidence that this has been done by the commissioners of taxes and assessments in the city of New York, we cannot assume that they have so transgressed for the purpose of approving of their work in this case. Real property cannot well be covered up or hid from view. Its value can readily be ascertained. It should be assessed upon estimates directly made as to its value and not upon presumptions figured upon intricate theories.

Again, the method presented by respondents' counsel involves the presumption that the indebtedness of the corporation represents property to the amount of such indebtedness in addition to that represented by its capital stock. This presumption cannot be indulged. The indebtedness may have been incurred for operating expenses, wages of employees and material used up. It may represent property worn out, decayed or burned up during the existence of the corporation. Presumptions that arise from the earnings of a corporation and those that arise from its indebtedness are quite different. Too many of the railroads of the country are in the

hands of receivers to warrant a judicial presumption that the bonded or other indebtedness of each road represents its actual tangible property in addition to that represented by its capital stock.

And again, the method proposed necessarily includes the value of the franchises possessed by the corporation which, as we have seen, cannot properly be included in the assessment under review.

Whilst the assessment made cannot be sustained, we think that the relator ought not to escape a proper assessment for the property. It is true that the commissioners are not free to capriciously disregard the evidence and emancipate themselves from all restrictions and rules, however fundamental; they are not bound by statements that are contradicted and which they disbelieve, where good reasons exist for such disbelief. (*The People ex rel. Union Trust Co.* v. *Coleman, supra; The People ex rel. Edison El. Co.* v. *Barker,* 139 N. Y. 55-67; *The People ex rel. Manh. F. Ins. Co.* v. *The Comrs. of Taxes,* 76 id. 64; *The People ex rel. Gen. El. Co.* v. *Barker,* 141 id. 251; *People ex rel. Westchester F. Ins. Co.* v. *Davenport,* 91 id. 574.) The letter of Mr. Davies in 1893 to the effect that if the assessment was made at $12,500,000 the company would acquiesce, having been written for the purpose of a settlement, and an adjustment of the controversy then existing, could not properly be adopted by the commissioners as the basis of an assessment for subsequent years. Still, at the same time, it might well create a suspicion as to the truthfulness of a statement made the year following, showing that so far as the property of the corporation was concerned, aside from its franchises, it was insolvent to the extent of $3,000,000. Aside from this, there exists the fact that the net earnings of the corporation for the year were such as to enable it to pay the interest upon its indebtedness and a dividend upon its thirty millions of capital stock of six per cent and still have a surplus bordering upon a million dollars. These facts fully justified the commissioners in discrediting the statement made to them by the relator. Personal property, unlike real property, may not always be readily found and assessments thereof by assessors are often attended with difficulties. For these reasons more latitude necessarily should be given assessors in ascertaining and determining the amount and value of personal property. Presumptions to some extent should be indulged. For this reason the earnings of a corporation may be considered by the assessors, and where they are such as to enable the company to pay its running expenses, necessary repairs, interest upon its indebtedness and declare a dividend of six per cent and still have a surplus, it may be assumed that its capital stock remains unimpaired and that there are assets over and

above sufficient to pay its outstanding indebtedness. (*People ex rel. The Equitable Gas Light Co.* v. *Barker,* 144 N. Y. 94.)

This method, however, may include the value of the franchises which should be deducted in order to determine the amount of property liable for assessment. Such value has not been given and we are consequently left without the evidence at hand upon which to determine the actual value of the personal property under the presumptions arising from the facts mentioned. It may turn out that the capital stock represents property to the amount thereof in additon to the franchises; that the stock issued to the stockholders of the New York, Metropolitan and Suburban companies represented money actually paid by the stockholders of those companies for real estate and the building construction and equipments of the elevated railroads thereon. Should such be the case, the presumption from the earnings of the company would be permissible, that the capital stock remained unimpaired, representing property over and above the franchises, to the amount thereof, and in addition, sufficient to pay the outstanding indebtedness. Upon this basis the assessable personal property could be determined by adding to the capital stock issued the surplus still of hand not invested in the real and personal property of the company and deducting therefrom the assessable value of the real estate, the stock in other companies and the ten per cent allowed by statute. The result would be as follows:

Capital stock		$29,925,200
Surplus on hand in cash		1,382,838
Total		$31,308,038
Real estate	$7,323,200	
Stock in other companies	7,075,200	
Ten per cent of capital	2,992,520	
		17,390,920
Amount assessable		$13,917,118

. . . .

The General Term was of the opinion that this assessment could be sustained upon the authority of *The People ex rel. The Equitable Gas Light Co.* v. *Barker* (144 N. Y. 94). The difficulty is that in that case the value of the patents and franchise was found to be $500,000, whilst in this case we have no value given to the franchises or facts appearing from which such value can be determined.

The statute provides that upon the return of a writ of certiorari to review an assessment the court shall have power to order the

assessment, if illegal, to be stricken from the roll, or, if erroneous or unequal, to order a re-assessment of the property, etc. (Laws of 1880, ch. 269, § 4.) The assessment in this case is not illegal; it is merely erroneous. A re-assessment should, therefore, be ordered.

The order of the General Term should be reversed and that of the Special Term modified so as to vacate the assessment made and order a re-assessment by the commissioners, without costs of this appeal to either party.

All concur, except O'BRIEN, J., not voting.

Ordered accordingly.

IX. EQUALIZATION.

PEOPLE EX REL. MINER V. SALOMON.

Supreme Court of Illinois. January, 1868.
46 Illinois, 333.

Mr. Chief Justice BREESE delivered the opinion of the court.

This was an application by the Auditor of Public Accounts of this State, for a mandamus against the County Clerk of Cook county, to compel him to extend on the books of the collectors of that county, the equalized tax ordered by the State Board of Equalization.

By the alternative writ the clerk was commanded, in preparing the books for the collectors of taxes, to provide therein five columns for values, specifying what the first and second columns should contain; and that he should extend in separate columns, State, county and all other taxes, against the equalized valuation according to the Auditor's certificate which the clerk had received, in which was set forth the action of the Board of Equalization in respect to Cook county, and in all cases of extension, when the equalized valuation should happen to be fractional, to reject all fractions falling below fifty cents; and that he should extend all fractions of fifty cents or more, as one dollar; and that when the collector's books were completed, he report to the Auditor the valuation as equalized, and the amount of State, county and other taxes charged thereon, and that he make to each collector a certificate of the rate of deduction or addition determined by the Board of Supervisors in the township to which such book should pertain, as required by sections eleven and fifteen, of the act entitled "An act to amend the Revenue Laws and

to establish a State Board for the Equalization of Assessments," approved March 8, 1867, and to do and perform all such acts and things in the premises as the law requires, or appear before the Supreme Court forthwith, to show cause why he refused so to do.

Accompanying the petition of the Auditor were the proceedings of the Board of Equalization, and this notice, directed to the clerk, and issued from the office of the Auditor, and bearing date October 14th, 1867: "Sir:—You are hereby notified that the State Board of Equalization, at their session begun on the first Tuesday, being the first day of October, 1867, determined the rate of 24 per cent to be added to the assessed valuation of all property listed for taxation in the County of Cook for the year 1867. You will, therefore, in pursuance of law, proceed to extend the equalized valuation of all property so listed, by increasing the valuation, as equalized by the Board of Supervisors, at the rate of 24 per cent."

The clerk made a formal and elaborate return to the writ, in which he takes exception to the action of the board in several particulars, but admits he has disregarded the action of the board, and the "request" of the Auditor to extend the taxes upon "the pretended" equalization made by that board, for the reason, that the act of the General Assembly, creating the board is unconstitutional and void, because it undertakes to establish a mode of ascertaining the value of property subject to taxation, in violation of the constitution, and their proceedings were not in conformity with that act, but so far as related to the County of Cook, were an arbitrary imposition of 24 per cent to the assessed value of property in that county, without any ascertainment of its real or proportionate value, and he prays the judgment of this court whether he ought to extend such taxes upon such pretended equalization of the property of that county.

To this return the relator demurred, and there was a joinder in demurrer.

. . . .

The small proportion which the actual revenue of the State bore to the real value of the property of the State, under the operation of laws, which, pretending to carry out the behests of the constitution, that all taxes should be levied by valuation, so that every person and corporation should pay a tax in proportion to the value of his or her property, to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly might direct, created widespread alarm and dissatisfaction, rendering it an abso-

lute necessity that some effective mode should be devised, by which this constitutional provision might be carried out in its true spirit.

The want of such a mode may be well admitted, when the returns of the assessors of the different counties are examined, which were made so late as 1867.

We have extracted from the table accompanying the report of the board of equalization, some startling cases of the gross inequality which prevailed up to the time of the meeting of the board. Reports of the Auditor of Public Accounts, made apparent the same grievances, and that body would have been recreant in their duty if they had not provided a proper correction.

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These gross inequalities pervade the table of assessments and that also shows, while the property of the southern and eastern counties in the State is assessed at something near its actual value, that of the northern and western and central counties are far below it. These inequalities permeated the whole system, and this wholesome provision of the constitution rendered practically inoperative; and the same was the case with real property.

If the legislature have no power, under the constitution, to provide a corrective for these monstrous evils, inflicting injustice upon the individual property owner, and robbing the treasury of the State of its just revenues, then, indeed, it must be conceded it is a feeble instrument, and the sooner it is overhauled and its weak places strengthened, the better.

But these evils, grievous as they are, and even if tenfold greater, furnish no apology to the legislature for a law to correct them, unless such law shall be within their constitutional competency to enact. As we have said in several cases, the framers of our constitution have taken great pains to affirm the principles of equality and uniformity, as indispensable to all legal taxation, whether general or local; and if the act of Feb. 8, 1867, eschews those principles or violates them, it must be condemned, however praiseworthy may have been the object, and however pressing the necessity. The great central idea of the constitution and of its framers, was not a system of revenue based on the valuation of property, but uniformity and equality in the assessment of the tax upon it when valued, so that every person should pay a tax in proportion to it. That is the leading idea. *Bureau Co.* v. *C., B. & Q. R. R. Co.,* 44 Ill. 229.

Is that object infringed upon by the act in question? Has not the valuation of property in Cook county been ascertained by persons appointed by the general assembly? and was not the manner of their

appointment an open question with the legislature? How have they proposed in their various revenue laws, to execute the powers conferred? Whether they have enacted it wisely or not, is not the question; it is a question of power only, and must be tested by the constitution alone.

Keeping in view that the central idea of section 2, article 9, of the constitution is uniformity of taxation, and that exact uniformity is, under no system, practically attainable, an approximation to it is all that can be demanded.

When property is valued by persons appointed or elected for that purpose, the injunction of the constitution is thus far beyond. Why are values to be ascertained? So that every person and corporation shall pay a tax in proportion to value. That is the sole object of valuation. How is the fact to be ascertained, that, in levying a tax on this valuation, which every person has been required to pay, is in proportion to its ascertained value? That is the important question.

While it is admitted that it is not practicable to ascertain the precise value of taxable property, and while the real object is to assess all property by the same standard, and as near its real value as is possible under all circumstances, every means the legislature may adopt to arrive at this standard, if not prohibited by the constitution, must be within their constitutional competency.

It may be asked, how shall the value be ascertained by the persons appointed or elected for that purpose? The constitution provides no mode. None of the details are found there. The great principle only is announced, that valuation shall be the basis, in order to produce uniformity in results, all else being left to the wisdom of the legislature. Whatever they may do, whatever mode they may prescribe, which does not overleap this boundary, must be legitimate.

It is seriously contended, that the mode prescribed by the eighth section of the act in question is not within this boundary, but outside of it, and consequently null and void.

That section is as follows:

"In equalizing the value of personal property in the several counties said board shall cause to be added together the average values of each kind of domestic animals and enumerated articles in each county, and the sum so obtained as compared with the added general averages of the same items throughout the State, shall be held by said board to indicate the proportion which the whole assessment of personal property in each county bears to the whole assessment of personal property throughout the State, and said personal property shall be equalized by said board in the manner hereinafter provided

for equalizing real property. Real property shall be equalized by adding to the aggregate assessed value thereof in every county in which said board may believe the valuation to be low, such per centum as will raise the same to its proportionate value, and by deducting from the aggregate assessed value thereof in every county in which the said board may believe the valuation to be too high, such per centum as will reduce the same to its proper value. When the relative valuations of real and personal property shall have been considered separately, said board shall combine the results in such manner as may be deemed equitable, and determine a uniform rate per cent. to be added to, or deducted from, both classes of property in each county, which rate per cent. shall in all cases be even and not fractional: *Provided,* that nothing herein contained shall be construed as interfering in any manner with the laws now in force in regard to the equalization of assessments as between the different townships, by the board of supervisors in counties adopting the township organization."

On this section hinges the argument of respondent's counsel, and rightly so, for by it is developed, fully, the system designed by the legislature for the purpose of approximating and carrying out the dominant idea of uniformity.

They say this mode of ascertaining the value of taxable property conflicts with the constitution, because it adopts a standard of value as a basis of taxation different from the one prescribed by the constitution; and that the general assembly had no power to provide for an equalization of assessments for any other purpose than to ascertain and fix the true value of the property assessed. And they say further, that it has no authority to equalize the assessments of the several counties by an arbitrary rule, which must produce great inequalities between the assessment of real and personal property, and which totally disregards the rights and interests of the individual tax payer, who alone is affected by it.

This error of the argument is apparent. It proceeds on the assumption that a standard of value has been adopted as a basis of taxation, not recognized by the constitution, and that the legitimate purpose of a board of equalization could only be to ascertain and give the true value, of the property assessed.

Such, we think, was not the purpose. The true value of property, by no system yet devised by the wit of man, can be exactly ascertained. An approximate value having been returned by assessors, it is the clear object of this section so to equalize the valuations among the several counties of the State as to approximate, not to reach, for that is also impracticable, a perfect, but an attainable degree of uniformity,

and thus carry out the great and central requirement of the constitution, and this by the application of the doctrine of averages, a doctrine which enters into all kinds of business, into all complicated affairs of life, and which has received the sanction of the learned and the wise of every civilized nation.

What is the object of this provision in the constitution? The answer is, to raise a revenue for the support of the government. On what shall it be raised? On property. In what manner? By valuing the property of the several counties, through the agency of persons elected or appointed for that purpose. On what principle must the tax be levied? On the principle of uniformity, by which all the citizens of all the counties shall pay a tax, not in precise proportion to the value of their property, but as nearly so as by the application of just principles to the valuation of it will be most likely to produce the desired result.

There is nothing in the constitution expressly prohibiting a revision of valuations and assessments, and that principle has been incorporated into our revenue system by all the revenue laws passed since the adoption of the present constitution.

In counties adopting township organization, ample provision is made for examining the assessment rolls of the different assessors in the several towns of the county, by the Board of Supervisors of the county, in order to ascertain whether the valuation in any one town or district bears just relation to that of all the other towns and districts in the county, and that Board is fully authorized to increase or diminish the aggregate valuation of real estate in any town or district, by adding or deducting such sum upon the hundred as may, in their opinion, be necessary to produce a just relation between all the valuations of real estate in the county, but in no instance to reduce the aggregate valuation of all the towns and districts below the aggregate as made by the assessors. Sec. 15, Sess. Laws 1861, page 243.

What is this but a board of equalization on a limited scale? It will not be contended that the County Board of Supervisors are persons elected or appointed for the purpose of valuing property. Not at all. Yet it has never been questioned that the power thus conferred upon it has been legally conferred. It was foreseen at the outset, by the legislature, that in counties having as many assessors as there were towns within it, there would be great discrepancies in the assessments. That common horses, in town A, might be valued at fifty or one hundred per cent., or more, above the same description of horses in town B, and even at a greater disproportion in town C.

What more just and equitable than that power should be reposed somewhere to correct this, and by raising up, or dropping down, or making an average among the several towns, a true valuation might be approximated. The object and purpose of the Board of Equalization is the same, with this difference, that they are required to equalize valuations between the several counties of the State. They are both parts, and very important parts, of our revenue system, which, inculcating valuation, at the same time does not lose sight of the dominant principle of equality and uniformity. The title of the bill is an act to amend the revenue laws. It is a step in the right direction, and although individual cases of hardship and injustice may happen under it, when first put in operation, its object and purposes commending it so much to the respect of the people, such cases will not be received as arguments against the validity of the law, or even its policy.

We perceive nothing in the act conflicting with section two of article nine of the constitution. Some of its details might, no doubt, be improved, as they will be, by future legislation, but the principle on which it is based commends it to our best judgment. Let a peremptory mandamus issue.

Walker J. dissenting.

Mandamus awarded.

PEOPLE V. SACRAMENTO COUNTY.

Supreme Court of California. July, 1881.
59 California 321.

Application for a writ of *certiorari*.

McKinstry, J.:

This proceeding was brought to test the jurisdiction of the Boards of Supervisors of the several counties, through which run railroads operated in more than one county, to raise or lower the assessments placed upon the property of such roads by the State Board of Equalization.

In Section 9, Article xiii of the constitution, it is provided: "The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation." Except with reference to its action in respect to the property of railroads operated in more

than one county, the duty of the State Board of Equalization, like that of the County Board, is such as its name imports—to equalize valuations already made. The State Board equalizes values as between different counties. The County Board equalizes valuations as between different parcels or articles of property in the same county. (*Wells Fargo & Co.* v. *State Board of Equalization,* 56 Cal. 194.) The power of the County Boards is limited to the equalization of the valuations of the local Assessors.

With the exception noted, the State Board of Equalization has no original power of assessment. But it is the manifest intent of the Constitution that the valuation of the railroad property, mentioned in Section 10 of Article xiii, shall be finally fixed and determined by the State Board of Equalization—the State Board has the exclusive power to assess and equalize its value. Thus the Constitution furnishes a system for the assessment of railroads, operated in more than one county, which is separate and distinct from that provided for the assessment of other property.

The system is prescribed in Section 10 of Article xiii: "The franchises, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

It cannot be doubted (if the Constitution is constitutional) that the State Board of Equalization has thus power to assess the railroad property mentioned in section 10 of article xiii, and to apportion the same to the several counties, etc. The portion of the section quoted is clearly self-executing. We are at a loss to imagine how any statute could make the duty of the State Board any clearer than does this distinct and positive mandate of the Constitution. If any doubt could possibly be built on the words cited, it would be dispelled by the first clause of the same section: "All property, *except as hereinafter in this section provided,* shall be assessed *in* the county, city and county, town, township or district in which it is situated, *in the manner prescribed by law.*" Thus by the very language of the Constitution, all other but the railroad property mentioned must be assessed by the local assessors, in the manner prescribed by statute; the railroad property must be assessed in the manner prescribed by the section of the Constitution.

If legislation is necessary (and it be true that none has been had)

to furnish machinery for transmitting to the several counties official notice of the apportionment made by the State Board of Equalization, or, if the statute in that regard has not been complied with by the State Board, or, if the tax cannot be legally collected for want of any appropriate legislation, no one of such defects or errors authorizes the Board of Supervisors to add to or deduct from the valuation of the State Board. Nay, even if it should be admitted (and we do not admit it), that the provision of the State Constitution which attempts to confer on the State Board of Equalization the exclusive power of assessing certain property, and of apportioning the tax thereon, is invalid, because in conflict with some provision of the Constitution of the United States, this invalidity would not increase the jurisdiction of the Supervisors as a Board of Equalization. In such case the attempted valuation by the State Board would be *void*. Could the Board of Supervisors make a valid assessment by reducing the amount of the *invalid* assessment made by the State Board of Equalization?

The order of respondents purporting to reduce assessments, as set forth in the petition herein, is annulled.

Myrick, Sharpstein, Ross, Thornton, and McKee, JJ., and Morrison, C. J., concurred.

CHAPTER XI.

THE COLLECTION OF THE TAX.

I. Distress and Sale.

McMILLEN V. ANDERSON.

Supreme Court of the United States. October, 1877.
95 United States, 37.

Mr. Justice Miller delivered the opinion of the court.

The defendant, tax collector of the State of Louisiana for the parish of Carroll, seized property of the plaintiff, and was about to sell it for the payment of the license tax of one hundred dollars for which the latter, as a person engaged in business, was liable. In accordance with the laws of Louisiana, plaintiff brought an action in the proper court of the State for the trespass, and in the same action obtained a temporary injunction against the sale of the property seized. Defendant pleaded that the seizure was for taxes due, and that his duty as collector required him to make it. On a full hearing, the court sustained the defence, and gave a judgment under the statute against plaintiff and his sureties on the bond for double the amount of the tax, and for costs.

Plaintiff thereupon took an appeal to the Supreme Court of Louisiana, and in his petition for appeal alleged that the law under which the proceedings of defendant were had is void, because it is in conflict with the Constitutions of Louisiana and of the United States, and, as he now argues, is specifically opposed to the provision of the Fourteenth Amendment of the latter, which declares that no State shall deprive any person of life, liberty, or property without due process of law.

The judgment of the Supreme Court of Louisiana, to which the present writ of error is directed, affirming that of the inferior court, must be taken as conclusive on all the questions mooted in the record except this one. It must, therefore, be conceded that plaintiff was liable to the tax; that, if the law which authorized the collector to seize the property is valid, his proceedings under it were regular; and that the judgment of the court was sustained by the facts in the case.

Looking at the Louisiana statute here assailed—the act of March 14th, 1873—we feel bound to say, that, if it is void on the ground assumed, the revenue laws of nearly all the States will be found void for the same reason. The mode of assessing taxes in the States by the Federal Government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done.

But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. The nation from whom we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration does not violate it. It enacts that, when any person shall fail or refuse to pay his license tax, the collector shall give ten days' written or printed notice to the delinquent requiring its payment; and the manner of giving this notice is fully prescribed. If at the expiration of this time the license "be not fully paid, the tax-collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property" of the delinquent, or so much as may be necessary to pay the tax and costs.

Another statute declares who is liable to this tax, and fixes the amount of it. The statute here complained of relates only to the manner of its collection.

Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have boards of revisers of tax assessments does not prove that taxes levied without them are void.

Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that State, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal.

But however that may be, it is quite certain that he can, if he is

wrongfully taxed, stay the proceeding for its collection by process of injunction. See Fonqua's Code of Practice of Louisiana, arts. 296-309 inclusive. The act of 1874 recognizes this right to an injunction and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon the dissolution of the injunction.

But is is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which requires such a bond as a condition precedent to its issue.

It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another.

Judgment affirmed.

See also Palmer v. McMahon, 133 U. S. 660, affirming 102 N. Y. 176; and Commonwealth v. Byrne, 20 Grattan (Va.) 165, *infra*. The legislature may provide for distress and sale of land for non-payment of taxes. See Springer v. United States, 102 U. S. 586, *supra*. Mr. Justice Swayne in his opinion in this case says: "Why is it not competent for congress to apply to realty as well as personalty the power to distrain and sell when necessary to enforce the payment of a tax? It is only the further legitimate exercise of the same power for the same purpose. . . . . . The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax-payer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

DONALD V. McKINNON.

Supreme Court of Florida. June, 1880.
17 Florida 746.

Mr. Justice WESTCOTT delivered the opinion of the court.

. . . .

The plaintiff claims title through two sources, a deed after sale of land for taxes, and a deed after sale under a judgment rendered by a justice of the peace.

As to the tax deed. During the trial defendant proved by L. M. Gamble, that he was collector of revenue for the year 1876, that he had the assessment book for that year and turned it over to his successor in 1877. "This book" was then offered to show that there was no warrant to it to the collector. Upon objection by the plaintiff, the book was ruled out by the court, and to this action there was an exception. . . . .

When, however, the then (that is in 1876) tax collector of revenue, L. M. Gamble, was offered as a witness to prove that there was no warrant to the assessment roll of 1876, under which this tax sale was had, we cannot see that this evidence was properly rejected. The law required that to the assessment roll delivered to the collector of revenue, a warrant under the hand of the assessor should be annexed in the following form to-wit: giving the form, &c.

Without this warrant "delivered by the officer of the law, designated for that purpose, the collector has no authority to proceed to enforce the payment of taxes." This being omitted, the performance of all the other acts, such as due advertisement, will lay no foundation for the sale of the land (5 Ired., 131; 7 New York, 517; 14 New Hamp., 84; Hilliard on Taxation, 396; Cooley on Taxation, 292; Blackwell on Taxation, 167). The warrant in this proceeding fills the place and performs the functions of a summons. It is the writ to the officer by which he is authorized for public purposes to collect the tax, or in the event of its non-payment to subject the property to sale. For this reason we think that the court erred in rejecting the proposed testimony of Gamble, the person who at the time of the sale was the collector of revenue, and who proposed to produce the assessment roll.

. . . .

The judgment is reversed and a new trial awarded.

In some states no such warrant is required but authority to collect the tax is given by statute on the making out and delivery of the tax list. Tallman v. Cooke, 43 Iowa 330. In case a warrant is required, a new warrant may be issued where the first one is void for irregularity. Eddy v. Wilson, 43 Vt. 362.

DANIELS V. NELSON.

Supreme Court of Vermont. August, 1868.
41 Vermont, 161.

Replevin for one bay mare. Plea, the general issue, and notice of justification by the defendant, under a rate-bill and warrant, as collector of school district No. 6 in Woodbury, and the taking the property as the property of Luke Daniels, on tax against him. Trial by the court, March term, 1868, Peck, J., presiding. Judgment for the defendant for damages and costs and for return of the property.

. . . .

BARRETT, J. In this case the property in question, a mare, was distrained upon a tax-warrant in satisfaction of a *poll-tax* against the plaintiff's father, there being no tax against him on account of said mare or any other property. The court found the legal title of the property to be in the plaintiff, as between him and his father, by a contract made in good faith, and not fraudulent *in fact*. But the court further found and held that the ostensible ownership and possession were so far in the father as to render the mare subject to levy for the tax, even if she would not have been if the plaintiff had taken and kept the exclusive possession and claim of title in himself. The question is thus directly presented, whether the doctrine of *fraud in law* is applicable, so as to subject the mare to the levy made in this case.

The several English statutes, the substance and spirit of which are embraced in our own, on the subject of fraudulent conveyances, are designed to protect creditors and *bona fide* purchasers, and the *fraud*, which gives occasion for those statutes, looks exclusively to such creditors and purchasers; and, moreover, they contemplate actual fraud both in intent and act. The doctrine persistently adhered to in Vermont, of *fraud in law*, does not give any additional scope either to the statutory or common law operation of *fraud*. That doctrine works in subordination to such law, and adopts a particular mode of determining the existence of the vitiating fraud in the given case. In a sense, it propounds a kind of rule of evidence, prescribing what facts proved shall be held to show the existence of such fraud. It says to the party, prove that there was no visible change of substantial. exclusive possession from the vendor to the vendee, and the fraud required by the law to invalidate the sale as against the creditors and *bona fide* purchasers, will be established.

In many states, and at some periods in England, the lack of such

change of possession has not been allowed such conclusive effect, but has constituted matter of circumstantial evidence bearing on the question of *actual* fraud. The conclusive effect of that fact in this, and some other of the States, has been allowed and adopted as matter, and on the ground, of *policy*.

. . . .

Now it is obvious that the policy and final cause of the rule can not be predicated of the case in hand. The party to which the tax is owing, is not a *creditor*. The state, the town, the school district, do not give credit by way of trust and confidence. They make an authoritative and arbitrary exaction, and are armed with all the power of the government for its enforcement out of any and all of the property of the party taxed including the *enticement* of the prison walls, in want of the property whereof to get satisfaction. In *Johnson* v. *Howard and Trustee* (41 Vermont 122), it was held that town taxes could not be deducted in diminution of the liability of the town as trustee of the defendant, under section 52 of chapter 34 of the General Statutes.

In the present case, as before remarked, the tax was not on account of any property. It was only a *poll*-tax that fact indicating that, likely enough, not property, but only the person of the party taxed, might be reached by warrant for its compulsory collection.

. . . .

As the present case does not fall within the reason of the rule, and as no precedent is shown for applying the rule to such a case, we see no legal ground or reason for subjecting the plaintiff's property to the compulsory payment of his father's poll-tax. No party in interest has been misled. No party in interest could be misled in such a case, by such possession and use of the property by the plaintiff's father as were shown in this case.

The fact that the defendant levied on it because of such possession and use, is no element in the law of the subject. It was an experiment on his part to get the tax satisfied. What gives potency to the lack of change of possession, is its tendency to induce false credit in the *creation* of claims against the former owner, who still continues in possession, not that it may induce a party to levy final process upon it in satisfaction of his claim. The case in this respect bears a close analogy to one feature of *Turner* v. *Waldo*, 40 Vt. 51.

. . . .

The judgment is reversed, and judgment for the plaintiff for nominal damages and his costs.

SHELDON V. VAN BUSKIRK.

Court of Appeals of New York. October, 1849.
2 New York, 473.

John Sheldon sued Lawrence Van Buskirk in a justice's court of the county of Cortland, in trespass for entering his close and taking and selling a number of sheep. The defendant was collector of the town of Preble, in that county, and justified under a warrant held by him for the collection of a tax against Thomas Sheldon, who was the plaintiff's son and resided on the same farm with him.

. . . .

The jury found a verdict for the defendant on which the justice rendered judgment. The county court of Cortland county, on certiorari, reversed the judgment of the justice, and the supreme court sitting in the sixth district, on error brought, reversed the judgment of the common pleas, and affirmed that of the justice. John Sheldon then brought error to this court.

RUGGLES, J. Van Buskirk, the collector, who was the defendant in the justice's court, was bound to prove on the trial, for the purpose of justifying himself in levying on and selling the property in question, that he acted under a lawful warrant issued by persons clothed with competent authority for that purpose. . . . . . . The warrant was in point of form substantially in pursuance of the statute, and was made by persons actually having lawful authority to make and issue it.

. . . .

Another point made by the plaintiff is, that the collector should have produced not only the warrant but the adjudication, or proceedings of the supervisors in the nature of an adjudication, by which the tax was laid, the collector having sold the goods of John Sheldon to satisfy the tax against Thomas Sheldon. . . . . . . Ever since the case of *Savacool* v. *Boughton,* 5 Wend. 170, a ministerial officer is protected in the execution of process regular on its face, and coming from a court or body of men having jurisdiction of the subject matter. Where an officer who has seized property by virtue of an execution, is sued by the defendant in the execution for taking the property, the officer is never compelled to produce the judgment to justify the taking. The execution alone protects him. But if the officer is sued by A. for taking his property under color of an execution against B., the question to be tried is whether the property when taken belonged to A. or to B. If it belonged to A., the execution,

with or without the judgment, is no protection, for it does not command the officer to take A.'s property. But if A. claims title to the property by virtue of a sale from B. to him, which is alleged to be fraudulent against B.'s judgment creditors, then it becomes necessary for the officer to produce the judgment on which the execution issued against B.; but this is for the purpose of proving, in connection with other testimony, that the pretended sale from B. to A. was fraudulent and void, and that the property therefore still belongs to B. and not to A. The judgment in such case is given in evidence, because it affects the title to the property in question, and not because it is for any other purpose necessary to protect the officer.

In the present case nothing is necessary for the protection of the officer except the warrant. John Sheldon does not claim title to the property in question from Thomas; and if he did it would make no difference. The collector is authorized by the statute (1 R. S. 387, § 2,) to sell not only the goods and chattels of the party taxed, "but any goods and chattels in his possession, and no claim of property made by any other person shall be available to prevent a sale." The jury found by their verdict that the property sold by the collector either belonged to or was in the possession of Thomas Sheldon. The defendant therefore had the right to sell.

. . . .

The judgment of the supreme court must therefore be affirmed, with the costs of the appeal, to be paid by the appellant.

Judgment affirmed.

BRACKETT V. VINING.

Supreme Judicial Court of Maine. 1860.
49 Maine 356.

Trespass. From the report of the evidence, offered at the trial, it appears that the plaintiff was collector of a school district tax, and, by virtue of his warrant, seized a horse as the property of one *Lord*, who refused to pay his assessed proportion of the tax. The property was taken by the plaintiff on the 27th day of October, 1859; and on the day following, he gave public notice for its sale on the third day of November,—on which day, and before the hour appointed for the sale, the defendant, as a deputy sheriff, having a writ of replevin in favor of said Lord, took the horse from the plaintiff's possession; whereupon, this action was commenced.

At *Nisi Prius,* Appleton, J., presiding, questions were raised by the counsel of the defendant, involving the legality of the tax, and of the proceedings of the plaintiff under his warrant. For the purpose of presenting the questions to the full Court, the presiding judge overruled the objections, and a verdict was rendered for the plaintiff. The defendant excepted.

At the argument on the exceptions, the counsel of the defendant, D. D. Stewart, submitted the case upon the point, that, by the terms of the warrant and by the statute, the property should have been sold at the expiration of four days after its seizure. After that time, the plaintiff could not legally sell. The keeping of the horse seven days, at least before the day of sale, was an unauthorized act, and the plaintiff thereby became a trespasser *ab initio.*

Goodenow, J.—The plaintiff did not comply with the directions of the warrant, by virtue of which he took the property in controversy, nor with the requirements of the statute relating to the sale of the property so taken. The warrant, therefore, is insufficient to protect him. He kept the property too long—beyond the expiration of the time, when it should have been sold—and, by so doing, must be regarded as a trespasser *ab initio.* It is unnecessary to consider the alleged illegality of the proceedings in the assessment of the tax. The exceptions must be sustained, verdict set aside, and a new trial granted.

Tenney, C. J., Rice, Cutting, May and Davis, JJ., concurred.

II. Liens and Forfeitures.

CONE V. WILSON AND ANOTHER.

Supreme Court of Indiana. May, 1860.
14 Indiana 465.

Perkins, J. *James Goodnow,* on the first day of *January,* 1858, was a resident of *Decatur* county, *Indiana,* and the owner of real estate to the value of 10,000 dollars, and of personal of the value of 2,000 dollars. On the aggregate amount of this property, there was assessed, for the year above named, a tax of 90 dollars.

On the 19th day of *November,* 1858, *Goodnow* assigned all of said property to *Forsyth* and *Wilson,* in trust for the payment of specified debts.

On the 15th day of *January,* 1859, *Goodnow* removed from *Decatur* county. Prior to *May,* 1859, all of said real estate had been conveyed to purchasers. In that month, the treasurer of *Decatur* county seized, for the payment of said tax against *Goodnow* one hundred cords of wood, a part of the property of said *Goodnow* assigned to said trustees as aforesaid, and which had not been removed from off the premises on which it was when the assignment was made; and the question is, was that wood liable to the seizure?

The personal property of a tax-payer is the primary fund out of which all the taxes assessed against him upon poll, personal, and real estate, are to be collected, so long as it may be found within the county. 1 R. S. p. 130, §§ 96, 101.

The aggregate amount of these taxes is a lien upon all the real estate of the tax-payer within the county, and no part of such real estate is discharged from the lien till the entire amount of tax is paid; though the application of a part payment to a particular piece or portion of such real estate, will relieve such piece or portion from liability to sale till the remaining portions are exhausted by sale. 1 R. S. p. 132, §§ 111, 112, 114.

The lien upon the real estate attaches on the first of *January,* annually, *Id.* § 112 (1).

Section 113, on the same page of the volume cited, reads as follows: "All the property, both real and personal, situate in any county, shall be liable to the payment of all taxes, penalties, interest, and costs charged to the owner thereof, in such county; and no partial payment of any such taxes, penalties, interest, or costs, shall discharge or release any part or portion of such property, until the whole be paid; which lien shall in no wise be affected or destroyed by any sale or transfer of any such personal property."

This section plainly implied a lien upon personal property for all taxes; but it does not fix the time when it shall commence. As between the state and the owner at the time of the assessment, it undoubtedly commences as soon as the duplicate is issued to the treasurer. See 1 R. S. pp. 129, 131.

An execution is a lien upon the defendant's property, as against all persons, from its delivery to the officer. 2 R. S. p. 131. Yet the officer holding it, should first call upon the defendant for payment before he levies upon property. Perk. Pr., p. 380.

The treasurer must do so, as to taxes, before he levies or seizes property by virtue of the duplicate. 1 R. S. pp. 129, 130.

And we do not think the mere assignment of property to trustees for the payment of debts constitutes such a transfer of it as will divest

the lien of the state upon the property against the tax-payer, however it might be in case of a transfer to an absolute purchaser, in good faith, for a valuable consideration.

Again, it does not appear that the possession of the wood seized in this case, had ever been delivered to the assignees, nor that the deed of assignment had been recorded.

We leave the general question as to the lien of taxes upon personal property under any and all circumstances, undecided.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

HENDERSON'S DISTILLED SPIRITS.

Supreme Court of the United States. December, 1871.
14 Wallace 44.

Mr. Justice CLIFFORD delivered the opinion of the court.

Distilled spirits, upon which no tax had been paid according to law, were, by the thirty-second section of the act of the thirteenth of July, 1866, subject to a tax of two dollars on each and every proof gallon, to be paid by the distiller, owner, or any person having possession thereof, and the same section provided that the tax shall be a lien on the spirits distilled, and on the distillery used for distilling the same, with the stills, vessels, fixtures, and tools therein, &c. (14 Stat. at Large 157). Express provision is also made by the fourteenth section of that act, that all goods or commodities, for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities, in case they shall be removed or shall be deposited or concealed in any place with intent to defraud the United States of such tax, or any part thereof, shall be forfeited. (Ib. 151). . . . .

Regular seizure of the one hundred barrels of distilled spirits in question was made on the first day of September, 1868, by the collector of the district, as alleged in the information, and the record shows that the information was duly filed by the district attorney on the seventh of the same month in the District Court of the United States for the district where the seizure was made. Being a seizure on land, the claimant was entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury and submitted the case to the court upon an agreed statement of facts, as

they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation. . . . . . . Pursuant to that stipulation the parties were heard, and the District Court dismissed the information and rendered judgment for the respondent. Exceptions were duly taken by the district attorney and he sued out a writ of error and removed the cause into the Circuit Court, where the judgment rendered by the District Court was affirmed, and the United States thereupon sued out a writ of error to the Circuit Court and removed the cause into this court for re-examination.

. . . . . . Six articles, each charging a forfeiture of the spirits in question, are contained in the information, but in the view of the case taken by the court it will only be necessary to examine the fourth in the series. . . . . .

. . . .

Four material ingredients are involved in the charge contained in the fourth article of the information: (1) That the spirits were manufactured at some place within the United States, between the day therein named and the date of the seizure. (2) That the spirits were then and there goods and commodities on which a tax was imposed by some provision of law then in force. (3) That the spirits were removed from the place where distilled with intent to defraud the United States of such tax. (4) That the tax was unpaid at the time the spirits were so removed, with such fraudulent intent.

Beyond all doubt the admission that the fourth article is true is a conclusive admission that each and every one of the well-pleaded allegations which it contains are also true, which, standing alone, would certainly be a confession on the record that the property is subject to forfeiture, unless it can be shown that the fourth article in the information is insufficient in law to warrant a judgment in favor of the United States.

Viewed in that light, as the admission must be, the next question is whether the statement appended to the admission is sufficient to save the property from condemnation in the possession of the defendant. Properly analyzed the statement appended to the admission contains two averments in avoidance of the consequences which would otherwise follow from the admitted acts of the antecedent owner: (1.) That the defendant paid the tax subsequent to the removal of the spirits from the distillery and before they were removed from the bonded ware-house and before the seizure by the collector. (2.) That he was a *bona fide* and innocent purchaser, without notice that the spirits were forfeited as alleged in that article of the information.

Where the forfeiture is made absolute by statute the decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree. (Roberts v. Witherall, 1 Salkeld 223; Robert v. Witherhead, 12 Modern, 92; United States v. Bags of Coffee, 8 Cranch 398; The Brigantine Mars, Ib. 417; Gelston v. Hoyt, 3 Wheaton, 311; Caldwell v. United States, 8 Howard 381; United States v. Grundy, 3 Cranch 338; Wood v. United States, 16 Peters, 342; Clifton v. United States, 4 Howard, 248). Subsequent payment of the duties, therefore, is no defence to an information for a forfeiture founded upon antecedent wrongful acts, as the effect of such wrongful acts, where the forfeiture is made absolute by statute, is to divest the owner of all property in the goods seized and to vest the title to the same in the United States, in case a prosecution ensues, and a decree of condemnation follows, as the decree of condemnation when entered by a court of competent jurisdiction relates back to the date of the wrongful acts as alleged and proved at the trial or in the hearing of the cause. (Fountain v. Ins. Co., 11 Johnson, 293; Kennedy v. Strong, 14 Id. 128). Repeated decisions of this court have established that rule in all cases where the forfeiture is made absolute by the act of Congress, and it necessarily follows that neither the subsequent payment of the duties nor the fact that the defendant is an innocent purchaser, without notice of the wrongful acts of the antecedent owner, constitutes any defence to the charge contained in the fourth article of the information. (Wilkins v. Despard, 5 Term, 112.) Many such adjudged cases are to be found in the reported decisions of this court, and it must be admitted that they establish the rule beyond all doubt, that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases where the statute in terms denounces the forfeiture of the property as a penalty for a violation of law, without giving any alternative remedy, or prescribing any substitute for the forfeiture, or allowing any exceptions to its enforcement, or employing in the enactment any language showing a different intent; and that in all such cases it is not in the power of the offender or former owner to defeat the forfeiture by any subsequent transfer of the property even to a *bona fide* purchaser for value without notice of the wrongful acts done and committed by the former owner. Established as that rule has been by the decisions of this court for more than half a century, it is insisted that it should be applied in the case before the court, and it is difficult to see any reason for rejecting the proposition, as the words of the act under

which the fourth article of the information is drawn denounce the forfeiture of the property in terms as absolute and unqualified as any which can be chosen in our language (United States v. Bags of Coffee, 8 Cranch 398; United States v. Grundy, 3 Id. 338). . . . . .

Concede all that and it is clear that the United States are entitled to judgment, if it be true that the forfeiture relates back to the date of the wrongful acts charged in the information. . . . . . . Nothing can be more certain in legal investigation than that the decree must have been for the United States if the claimant had demurred to the fourth article of the information, unless it can be held that the act of Congress denouncing the forfeiture is unconstitutional, as the article in question embodies the exact language of that provision, and it is equally certain that a motion in arrest of judgment would also have been unavailing for the same reason, and also because the validity of the act of Congress is beyond all doubt.

Congress possesses the power to levy taxes, duties, imposts, and excises, and it is as clear that Congress may enact penalties and forfeitures for the violation of such laws as it is that Congress may levy the taxes or duties or pass laws for their collection, safe-keeping, and disbursement.

. . . .

Tested by the charge, as made in that article, and the admission applicable to it, as exhibited in the agreed statement, as the question must be, and it is clear that the spirits may have been removed elsewhere than to a bonded warehouse before they were placed in that depository by the owner and distiller. Such certainly would be the legal conclusion if the defendant had demurred to the information, and the court is of the opinion that the same conclusion must follow from the admission that the fourth article of the information is true, as the admission is expressed in the agreed statement.

Henderson, the claimant, purchased the spirits while they were in the bonded warehouse and after they had been deposited therein by the owner of the distillery where the spirits were manufactured, and having made the purchase without notice that any fraud had been practiced by the distiller, and having paid the tax before the spirits were removed from the bonded warehouse, it is insisted by his counsel, in every possible form of argument, that his title is perfect and that the spirits are not liable to forfeiture, but the decisive answer to all that is the one already given, that the forfeiture relates back to the unlawful or wrongful acts of the antecedent owner, and that he cannot by any subsequent transfer of the property defeat the title of the United States, as settled by a series of decisions which, if

traced to their source, have their origin in the early history of the common law. (4 Bacon's Abridgment, 346; Plowden, 488, b. Co. Litt. 25; 1 Chitty's Criminal Law, 727.)

Rules of decision of such long standing and so necessary to protect the public revenue cannot be changed, nor can it be admitted that the charge contained in the fourth article of the information may not be sustained, even if it appears that the only removal of the spirits made by the distiller was to the bonded warehouse, as assumed in argument by counsel for the defendant. (Clarke v. Insurance Co., 1 Story, 109).

Unquestionably a removal of distilled spirits from the place where distilled to such a depository, if made to secure the payment of the tax, is lawful, but it is equally clear that if it is made with intent to defraud the United States of the tax it is an unlawful act, and subjects the spirits to forfeiture.

Grant that the removal was rightful, as assumed by the circuit judge, and the consideration which he adopted would follow, but it cannot be assumed in this case that the removal was rightful, as the charge in the fourth article of the information is that it was made with intent to defraud the United States of the tax, and the admission in the agreed statement is that the fourth article of the information is true, which shows as fully as it can be shown that the United States are entitled to a decree of condemnation, unless it can be established that the fraudulent intent there charged could not under any circumstances be carried into effect by such a removal as that alleged in the fourth article of the information and admitted in the agreed statement.

. . . .

Cases have arisen, as the records of this court show, where the removal to the bonded warehouse was made as a part of a preconcerted arrangement with other parties to avoid the payment of the tax, and it would not be difficult to suppose other cases where the removal of the spirits from the place where distilled to the bonded warehouse would be a necessary part of a well-devised scheme to defraud the United States by delivering the spirits to purchasers without the payment of the duties. (Distilled Spirits, 11 Wallace, 364).

. . . .

Spirits placed in such a depository sell more readily than before they were removed, because they are regarded as less likely to be subject to forfeiture than while they remained in the distillery, but it is clear that the theory that an intent to defraud the United States cannot be predicated of a removal of spirits from the place where

distilled to a bonded warehouse is an erroneous theory, as it is manifest that the dishonest distiller, if he can obtain the assistance of the inspector, storekeeper, or collector, as a partner or agent, will find such removal an essential step in almost every scheme which he may devise to accomplish his wicked designs.

Viewed in any light, therefore, the court is of opinion that the judgment of the Circuit Court is erroneous.

Questions are also presented in the record under the fifth and sixth articles of the information, but the court having come to the conclusion that the United States are entitled to judgment upon the fourth article of the information, do not deem it necessary to express any opinion as to the other questions.

Judgment reversed and the cause remanded with instructions to render *Judgment for the United States.*

Mr. Justice FIELD, with whom concurred the CHIEF JUSTICE and Mr. Justice MILLER, dissenting.

ALBANY BREWING CO. V. MERIDEN.

Supreme Court of Errors of Connecticut. June, 1880.
48 Connecticut 243.

Bill in equity, to set aside or postpone two tax liens; brought to the Court of Common Pleas for New Haven County. Facts found and case reserved for advice. The case is fully stated in the opinion.

PARDEE, J. This is a bill in equity; in it the petitioners ask the Court of Common Pleas for New Haven County either to declare that certain tax liens recorded by the town of Meriden against a piece of land therein belonging to them are illegal and void, or, if legal, that they are to be postponed to their mortagage title.

In June, 1874, John Brady and Hugh Grogan, then owning the lot, mortgaged it to Moriarty and Abell of New Haven; in September, 1876, Brady conveyed his interest to Grogan; in March, 1877, the latter conveyed it to his assignee in bankruptcy, who sold it at public auction on July 27, 1877, to C. C. Herbert, who purchased it as agent for the petitioners; the latter subsequently bought the mortgage.

At the public sale the assignee gave notice in hearing of Herbert, that the taxes hereinafter mentioned were an incumbrance upon the property, and he accepted a deed in which they were specified as such.

During the years 1874-5-6, Brady and Grogan were the joint owners of this and four separate pieces of land in the town of Meriden, also of personal property valued at about $1,000. In each of those years they made and delivered to the assessors a list of their property for purposes of taxation, in each of which they made one item of their separate pieces of land and named one sum as the value of all. If the taxpayer chooses to list and value separate pieces of land as one, and thus invite an assessment thereon as one, and the assessors accept the list and accede to the request, it is not for him nor for any grantee of his to complain after all opportunity for separate assessment has passed.

Up to the time of his bankruptcy Grogan was in possession of personal property sufficient to pay these taxes; during a portion of the time prior to October, 1877, and during all of the time since, Brady has been in possession of personal property sufficient to pay them. The collector demanded payment from each, but having no knowledge of the possession of personal property by either, no steps were taken to enforce or secure payment other than the filing of notice of a lien.

The tax upon the list of 1874 became payable on April 20th, 1875; and the tax upon the list of 1875 on April 21st, 1876. Upon April 19th, 1876, the selectmen of Meriden recorded a lien against the lot for the first, and upon April 20th, 1877, another for the last of these taxes. These were assessed upon all of the estate, real and personal, of Brady and Grogan. The liens were filed under the statute (Gen. Stats., p. 163, secs. 15 and 16,) which provides that "real estate, owned by any person in fee or for life or for a term of years, by gift or by devise and not by contract, shall stand charged with his lawful taxes in preference to any other lien, and may be sold for the same and costs of collection within one year after the taxes become due, notwithstanding any transfer thereof, or any levy of attachment or execution thereon; and shall after the expiration of such year, and before any such transfer or levy, remain liable for the payment of such taxes and costs until paid; but no real estate so transferred or levied upon shall be sold for the payment of any taxes laid upon a list made after such transfer or levy, nor shall any real estate, legally transferred, attached or taken by execution, be sold for taxes when other estate can be found sufficient to pay them and the legal costs." . . . "The selectmen of any town may continue any tax lien upon any real estate therein for not more than ten years after the tax becomes payable, by recording in the land records of the town within the first year of said period their certificate, describing the real estate, the amount of the tax and the time when it became

due; and thereupon such tax shall remain a lien upon such land at interest at seven per cent. a year, and said land may at any time during said period be sold for said tax in the same manner as if sold within said first year."

This statute authorized the imposition upon one piece of land of a lien for all taxes legally assessed against the owner thereof, not only upon that but upon any other land or property belonging to him.

For the period of one year from the several dates when they became payable, the taxes took precedence of every other lien upon the real estate of Brady and Grogan, and the same might have been taken therefor without regard to the transfer thereof or the levy of an execution thereon; within that period and while that lien was in full force the selectmen legally gave to it the statutory extension of ten years, thus preserving to it during that period the priority which it enjoyed during the first year of its existence. This lien with its extension is a statutory creation; it stands quite apart from the matter of selling land upon a tax-warrant, and is not encumbered by any proviso as to the possession of other property. It is a concession to the taxpayer. The State waives its right to immediate payment by a forced sale, and accepts a first mortgage for ten years. All that the statute has made necessary to its validity is a legal assessment and a proper and timely record of the lien.

This lien takes precedence of all others; mortgages take their security with knowledge that the sovereignty must and will take by taxation all that is necessary to the preservation of its own life; the life of the State is of higher concern than the protection of a debt due to an individual member of it. Therefore every piece of real estate must contribute its fair proportion to the public treasury if the authorities move within a specific time and according to statutory methods; and this regardless of mortgagees or purchasers.

We advise the Court of Common Pleas to dismiss the petition.

In this opinion the other judges concurred.

KING V. MULLINS.

Supreme Court of the United States. October, 1897.
171 U. S. 404.

Mr. Justice Harlan delivered the opinion of the court.

This action of ejectment was brought to recover that part lying in the state of West Virginia of a tract of 500,000 acres of land patented by the commonwealth of Virginia in 1795 to Robert Morris, assignee of Wilson Cary Nicholas.

. . . .

At the trial in the circuit court the plaintiff introduced in evidence the patent to Morris showing that the lands therein described were granted without conditions. Evidence was also introduced tending to show that by sundry mesne conveyances and legislative and judicial proceedings the title of Morris became vested, in 1866, in Robert Randall, trustee; in John R. Reed, trustee, on the 29th day of June, 1886; and through sundry mesne conveyances by Reed, trustee, David W. Armstrong and John V. LeMoyne in the plaintiff King on the 27th day of December, 1893.

The defendants resisted the claim of the plaintiff upon the general ground that prior to the date of the deed from LeMoyne, the lands embraced in the patent were absolutely forfeited to the state, and were so forfeited when the present action was instituted.

. . . .

The controlling question in this case relates to the validity under the Constitution of the United States of certain provisions in the constitution and statutes of West Virginia for the forfeiture of lands by reason of the failure of the owners during a given period to have them placed upon the proper land books for taxation.

. . . .

The question of constitutional law thus presented is one of unusual gravity. On the one hand, it must not be forgotten that the clause of the National Constitution which this court is now asked to interpret is a part of the supreme law of the land, and that it must be given full force and effect throughout the entire Union. The due process of law, enjoined by the Fourteenth Amendment must mean the same thing in all the States. On the other hand, a decision of this court declaring that the amendment forbids a State, by force alone of its constitution or statutes, and without inquisition or inquiry in any form, to take to itself the absolute title to lands of the citizen because of his failure to put them on record for taxation, or to pay

the taxes thereon, might greatly disturb the land titles of two States under a system which has long been upheld and enforced by their respective legislatures and courts. Under these circumstances, our duty is not to go beyond what is necessary to the decision of the particular case before us. If the rights of the parties in this case can be fully determined without passing upon the general question whether the clause of the West Virginia constitution in question, *alone considered,* is consistent with the national constitution, that question may properly be left for examination until it arises in some case in which it must be decided.

We come then to inquire whether, looking at the constitution and the statutes of West Virginia together, a remedy was not provided which, if pursued, furnished to the plaintiff and those under whom he asserts title all the opportunity that "due process of law" required in order to vindicate any rights that he or they had in respect of the lands in question.

. . . .

It thus appears that when the lands in question and others embraced in the Morris patent were, as is contended, forfeited to the state for the failure of the owner during the five consecutive years after they were redeemed by Randall, trustee, in 1883, to have them entered upon the land books of the proper county and charged with the taxes thereon, it was provided by the statutes of West Virginia:

That all lands thus forfeited to the State should be sold for the benefit of the school fund;

That the sale should be sought by petition filed by the commissioner of school lands in the proper Circuit Court, to which proceeding all claimants should be made parties, and be brought in by personal service of summons upon all found in the county, or by publication as to those who could not be found;

That the petition should be referred to a commissioner in chancery, who should report upon the same and upon such other things as the court might direct, and particularly as to the amount of taxes due and unpaid upon any lands mentioned in the petition, in whose name and when and how forfeited, and in whom the legal title was at the time of the forfeiture;

That if there were no exceptions to the report, or if there were exceptions which were overruled, the court was required to confirm the same and decree a sale of the lands for the benefit of the school fund; and,

That at any time during the pendency of the proceedings instituted for the sale of forfeited lands for the benefit of the school

fund, the owner, or any creditor of the owner having a lien thereon, might file his petition in the Circuit Court of the county for the redemption of his lands upon the payment into court, or to the commissioner of school lands, of all costs, taxes and interest due thereon, and obtain a decree or order declaring the lands redeemed so far as the title thereto was in the State immediately before the date of such order.

. . . .

If, as contended, the State without an inquisition or proceeding of some kind declaring a forfeiture of lands for failure during a named period to list them for taxation, and by force alone of its constitution or statutes, could not take the absolute title to such lands, still it was in its power by legislation to provide, as it did, a mode in which the attempted forfeiture or liability to forfeiture could be removed and the owner enabled to retain the full possession of and title to his lands.

We should therefore look to the constitution and statutes of the State together for the purpose of ascertaining whether the *system* of taxation established by the State was, in its essential features, consistent with due process of law. If, in addition to the provisions contained in the constitution, that instrument had itself provided for the sale of forfeited lands for the benefit of the school fund, but reserved the right to the owner, before sale and within a reasonable period, to pay the taxes and charges due thereon, and thereby relieve his land from forfeiture, we do not suppose that such a system would be held to be inconsistent with due process of law. If this be true, it would seem to follow necessarily that if the statutes of the State, in connection with the constitution, gave the taxpayer reasonable opportunity to protect his lands against a forfeiture arising from his failure to place them upon the land books, there is no ground for him to complain that his property has been taken without due process of law.

Much of the argument on the behalf of the plaintiff proceeds upon the erroneous theory that all the principles involved in due process of law as applied to proceedings strictly judicial in their nature apply equally to proceedings for the collection of public revenue by taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character.

. . . .

It thus appears that under the statutes of West Virginia in force after 1882 the owner of the forfeited lands had the right to become

a party to a judicial proceeding, of which he was entitled to notice, and in which the court had authority to relieve him, upon terms that were reasonable, from the forfeiture of his lands.

It is said that the landowner will be without remedy if the commissioner of the school fund should fail to institute proceedings in which the statute permitted such owner to intervene by petition and obtain a redemption of his lands from the forfeiture claimed by the State. It cannot be assumed that the commissioner will neglect to discharge a duty expressly imposed upon him by law, nor that the courts are without power to compel him to act, where his action becomes necessary for the protection of the rights of the landowner.

It is further said that a forfeiture may arise under the constitution of West Virginia despite any effort of the landowner to prevent it; that although the owner may direct his lands to be entered on the proper land books, and that he be charged with the taxes due thereon, the custodian of such books may neglect to perform his duty. Thus, it is argued, the lands may be forfeited by reason of the landowner not having been, in fact, charged on the land books with the taxes due from him, although he was not responsible for such neglect. We do not so interpret the state constitution or the statutes enacted under it. If the landowner does all that is reasonably in his power to have his lands entered upon the land books and to cause himself to be charged with taxes thereon, no forfeiture can arise from the owner not having been "charged on such books" with the state tax. The state could not acquire any title to the lands merely through the neglect of its agent having custody or control of its land books. Any steps attempted to be taken by the officers of the state based upon such neglect of its agent—the taxpayer not being in default—would be without legal sanction, and could be restrained by any court having jurisdiction in the premises. We go further and say, that any sale had under the statute providing for a sale, under the order of court, for the benefit of the school fund, of lands alleged to be forfeited by reason of their not having been charged on the land books for five consecutive years with the state tax due thereon, would be absolutely void, if the landowner was not before the court, and had not been duly notified of the proceedings, but had done all that he could reasonably do to have his lands entered on the proper books and to cause himself to be charged with the taxes due thereon. If the state was not entitled to treat them *as forfeited lands,* that fact could be shown in the proceeding instituted for their sale as lands of that character, and the rights of the owner fully protected. In the present case it does not appear that any evidence was offered tending to

show that the absence from the land books of any charge of taxes on the lands claimed by the plaintiff during five consecutive years after their redemption by Randall, trustee, in 1883 was due to any neglect of the officers of the State, or that the plaintiff, or those under whom he asserts title, entered or attempted to enter the lands upon the land books, or that he or they caused or attempted to cause the lands to be charged with taxes thereon. But there was evidence tending to show that the requirements of the constitution were not met during any of the years from 1883 to the bringing of this action. So far as the record discloses, it is a case of sheer neglect upon the part of the landowner to perform the duty required of him by the constitution and statutes of the State.

. . . .

For the reasons stated, we hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed or caused to be placed during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the State in the proper Circuit Court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the constitution of the State.

Having discussed all the points suggested by the assignments of error which we deem it necessary to examine, we conclude this opinion by saying that as neither the plaintiff nor those under whom he claims title availed themselves of the remedy provided by the statutes of West Virginia for removing the forfeiture arising from the fact that, during the years 1884, 1885, 1886, 1887 and 1888, the lands in question were not charged on the proper land books with the state taxes thereon for that period or any part thereof, the forfeiture of such lands to the State was not displaced or discharged, and the Circuit Court properly directed the jury to find a verdict for the defendants. The plaintiff was entitled to recover only on the strength of his own title. Whether the defendants had a good title or not the plaintiff had no such interest in or claim to the lands as enabled him to maintain this action of ejectment. We concur in what the Supreme Court of Appeals of Virginia said in a case recently decided: "In an action of ejectment the plaintiff must recover on the strength of his own

title, and if it appear that the legal title is in another, whether that other be the defendant, the Commonwealth, or some third person, it is sufficient to defeat the plaintiff. It appears that the title has been forfeited to the Commonwealth for the nonpayment of taxes, or other cause, and there is no evidence that it has been redeemed by the owner, or resold, or regranted by the Commonwealth, the presumption is that the title is still outstanding in the Commonwealth." *Reusens* v. *Lawson,* 91 Virginia 226.

The judgment of the circuit court of the United States is

Affirmed.

III. Arrest and Imprisonment.

PALMER V. McMAHON.

Supreme Court of the United States. October, 1889.
133 U. S. 660.

This was a writ of error to the Court of Common Pleas for the city and county of New York to review a judgment and order finding Francis A. Palmer guilty of misconduct in neglecting to pay personal taxes assessed, imposed and confirmed against him for the year 1881, and ordering that he stand committed until he should have paid the amount of the said taxes, with interest and costs, unless the court should see fit sooner to discharge him, which judgment and order was rendered in a proceeding brought under the provisions of chapter 230 of the laws of the state of New York of 1843, Art. 2, sections 12 and 13.

Mr. Chief Justice Fuller delivered the opinion of the court.

We are bound by the decision of the court of appeals of the State of New York adversely to the plaintiff in error, as to failure to comply with the state statute in relation to the method of procedure, form of assessment, oath of assessors, etc., in respect to which it may be further remarked that the attack in this case is in its nature collateral. *Stanley* v. *Supervisors* 121 U. S. 535; *Supervisors* v. *Stanley,* 105 U. S. 305. We proceed to examine therefore whether the assessment was invalid because the statute under which it was laid contravened the Constitution or laws of the United States, and whether the proceedings authorized by chapter 230 of the laws of 1843, operated to

deprive the citizen of liberty or property without due process of law.

. . . .

It is argued that chapter 230 of the laws of New York of 1843 is unconstitutional, as depriving the plaintiff in error of liberty and property without due process of law, and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. That amendment provides, that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is insisted that Palmer had no notice and no opportunity to be heard or to confront or cross-examine the witnesses for the taxing authorities or to subpoena witnesses in his own behalf; and had not otherwise the protection afforded in a judicial trial upon the merits. The phrase "due process of law" does not necessarily mean a judicial proceeding. "The nation from whom we inherit the phrase 'due process of law,'" said this court, speaking by Mr. Justice Miller, "has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation." *McMillen* v. *Anderson,* 95 U. S. 37, 41.

The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law. *Spencer* v. *Merchant,* 125 U. S. 345; *Walston* v. *Nevin,* 128 U. S. 578. The imposition of taxes is in its nature administrative and not judicial, but assessors exercise *quasi* judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value.

It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment and prescribes the time during which and the place where such complaints may be made. *Hagar* v. *Reclamation District,* 111 U. S. 701, 710.

The law of New York gave opportunity for objection before the tax commissioners, Laws of New York, 1859, c. 302, section 10, p. 681, and the plaintiff in error appeared and obtained a large deduction from the original valuation. If dissatisfied with the final action of the commissioners, he could have had that action reviewed on *cer-*

tiorari. Laws of New York, 1859, c. 302, § 20, p. 684; *People* v. *Commissioners,* 4 Wall. 244. But he did not avail himself of this remedy.

The proceeding here was purely an executive process to collect the tax after the liability of the party was finally fixed.

Collection by distress and seizure of person is of very ancient date, *Murray's Lessee* v. *Hoboken Land Company,* 18 How. 272; and counsel for defendant in error cites many English statutes, commencing with the twelfth year of Henry VII, c. 13, which in their essential features resemble the New York law upon the subject, one in 6 Henry VIII, c. 26, being strikingly like it. 2 Statutes of the Realm 644; 3 Ib. 156, 230, 516, 812; 4 Ib. 176, 334, 385, 744, 991, 1108, 1247; 5 Ib. 700; 7 Ib. 567. Under the act of 1843 commitment is not resorted to until other means of collection have failed and then only upon a showing of property possessed, not accessible to levy, but enabling the owner to pay if he chooses, this constituting such misconduct as justifies the order. That law had been in existence for more than forty years at the time of this proceeding. We do not regard the collection in this way, founded on necessity and so long recognized by the State of New York as to be justifiably resorted to under the circumstances detailed in the act, and operating alike on all persons and property similarly situated, as within the inhibitions of the Fourteenth Amendment.

The judgment is

Affirmed.

Mr. Justice BLACTHFORD did not take any part in the decision of this case.

COMMONWEALTH V. BYRNE.

Supreme Court of Appeals of Virginia. January, 1871.
20 Grattan 165.

MONCURE, P. The petitioner does not claim his discharge from imprisonment upon the ground that the Legislature had not a right to impose the tax, for the non-payment of which he was arrested; nor upon the ground that he did not use and enjoy the privilege on which the tax was imposed; nor upon the ground that he has paid the tax, or any part of it; nor upon the ground that, at the time of his arrest, he had any property out of which the tax, or any part of it,

could have been made by a levy thereon. He does not even show, or say, that he has not, in his pocket, or at his command, the means of paying the tax. But he places his defence upon the grounds: *First.* That the law authorizing an arrest and imprisonment in such cases is unconstitutional and void, because contrary to the constitutions both of the United States and of this State.

. . . .

First, as to the constitutionality of the law under which the petitioner was arrested.

That law is the 63d section of chapter 57 of the acts of the General Assembly, passed at the session of 1866-67, Sess. Acts, p. 849, and is in these words:

"63. Within ten days after the commissioner of the revenue shall have granted a certificate to obtain a license, he shall deliver to the sheriff or other collector of the taxes on such licenses, a list of all such certificates, as far as he may have progressed with the same; which list shall be the guide of the sheriff or collector in collecting the taxes imposed by law on such license. If the taxes be not paid, the sheriff or collector shall distrain, immediately upon the receipt of such list, for the amount with which any person may have been assessed; and he may sell, upon ten days' notice, so much of such person's property, subject to distress, as may be necessary to pay the taxes so assessed, and the cost attending its collection. If the sheriff or collector shall be unable to find sufficient property to satisfy the taxes so assessed, and the same shall not be immediately paid, the said sheriff or collector shall arrest the person so assessed, and hold him in custody until the payment is made, or until he enter into bond, with sufficient security, in a penalty at least double the amount of the taxes so assessed, conditioned for his appearance before the Circuit court of his county or corporation, to answer such action of debt, indictment or information as may be brought against him, and to satisfy, not only the fine imposed, but to pay the taxes assessed; and it shall be lawful for the court, upon the trial of such action of debt, indictment or information, to render judgment upon such bond for the fine imposed and the taxes which may be assessed."

. . . .

Is the law in question contrary to that Bill of Rights of Virginia which declares that no man shall "be deprived of his liberty, except by the law of the land or the judgment of his peers?"

That a man may be deprived of his liberty by the law of the land is conceded by the very terms of the provision just metinoned. That he cannot "be deprived of his liberty except by the law of the land,"

necessarily implies that he may be deprived of it by the law of the land; and this is certainly an undeniable fact.

. . . .

What, then, is the meaning of these words, "law of the land," in this connection, and do they embrace the law under consideration? These are the questions we now have to dispose of.

. . . .

. . . . The meaning of such a provision has been the subject of consideration and decision in many cases. The most important of them all seems to be the case of *Murray's lessee, &c.,* v. *Hoboken Land & Improvement Co.,* 18 How. U. S. R. 272-286, decided by the Supreme Court of the United States at December Term, 1855. Mr. Justice Curtis delivered the opinion of the court, which was unanimous. In that case it was held, among other things, that a distress warrant, issued by the solicitor of the treasury, under the act of Congress passed on the 15th of May, 1820, (3 Stats. at Large, 592), is not inconsistent with the constitution of the United States; that it was an exercise of *executive* and not of *judicial* power, according to the meaning of those words in the constitution; and that it is not inconsistent with that part of the constitution which prohibits a citizen from being deprived of his liberty or property without due process of law.

. . . .

After giving an account of the practice pursued at different times in England in such cases, the court say: "This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects, and that as respects such debts due from such officers, 'the law of the land' authorizes the employment of auditors, and an inquisition without notice, and a species of execution, bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question.

It is certain that this diversity in "the law of the land," between public defaulters and ordinary debtors, was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the declaration of independence and before the formation of the constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, issuing against the body, goods and chattels of defaulting

receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it. Without a wearisome repetition of details, it will be sufficient to give one section from the Massachusetts act of 1786." After giving which the court refers to similar provisions contained in the acts of Connecticut, Pennsylvania, South Carolina, New York, Virginia and Vermont, passed before the formation of the constitution of the United States, and in the acts of Louisiana and the United States, passed since that period; and then say: "This legislative construction of the constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question, whether the proceeding adopted by it was 'due process of law'." "Tested by the common and statute law of England, prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820, cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the constitution some other provision which restrains Congress from authorizing such proceedings. For, though 'due process of law' generally implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; *Hoke* v. *Henderson,* 4 Dev. N. C. R. 15; *Taylor* v. *Porter,* 4 Hill R. 140, 146; *Van Zant* v. *Waddell,* 2 Yerg. R. 260; *State Bank* v. *Cooper,* Id. 599; *Jones' Heirs* v. *Perry,* 10 Id. 59; *Greene* v. *Briggs,* 1 Curtis C. C. R. 311), yet this is not universally true. There may be, and we have seen that there are cases, under the law of England, after *magna charta* and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors, without any such trial; and this brings us to the question, whether these provisions of the constitution which relate to the judicial power, are incompatible with these proceedings?"

The court then proceed to examine this question, and arrive at the conclusion that no such incompatibility exists. In the course of their remarks upon this subject, they say: "As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity, and in many of the States, so far as we know, without objection, for this

purpose, at the time the constitution was formed. It may be added that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or on the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to."

I have made these long quotations, because the case from which they are taken is one of the highest authority, and seems to be conclusive of the main point in controversy in this case, and because the language of the court in that case expresses the views which I wish to present, much more strongly and aptly than I can do, by any language of my own. Many other cases may be cited in support of the same views.

. . . .

In Blackwell on Tax Titles, p. 176, edition of 1864, chapter 9, the writer says: "Where the person against whom a tax has been legally assessed neglects or refuses to pay the tax voluntarily, after a notification and demand made by the collector in the manner provided by law, the necessities of the State compel a resort to coercive means. In some States the law requires the body of the delinquent to be arrested and imprisoned in satisfaction of the tax." *Bassett* v. *Porter,* 4 Cush. R. 487; *Daggett* v. *Everett,* 19 Maine R. 373; *Rising* v. *Granger* 1 Mass R. 47; *Appleton* v. *Hopkins,* 5 Gray's R. 530. "In other States, the law requires the tax to be collected out of the personal estate of the delinquent if a sufficiency can be found to satisfy it. In South Carolina the statute thus marshals the remedies: 1. A distress of the personal estate of the delinquent; 2. The sale of the land; 3. The seizure and imprisonment of the body. *Kingman* v. *Glover,* 3 Rich. R. 27. A violation of the order of remedies thus prescribed invariably renders the act of the officer illegal. It is the policy of the law to resort to the land itself only when all other remedies fail to enforce a satisfaction of the tax. The person or personal estate of the delinquent is regarded as the primary, the land as the dernier resort. The tax never becomes a charge upon the land until the other remedies have been exhausted." "The law admits of no substitution or change in the order thus established. It is therefore held that the land of the delinquent cannot be sold in those States which authorize imprisonment, if his body can be found, nor can a resort be had to the land, in States where the personal estate is re-

garded as the primary fund, as long as a sufficiency of personal estate can be seized and sold in satisfaction of the tax: a sale of the land, under such circumstances, is illegal and void."

I presume no one will contend, and I do not understand the learned counsel for defendant in error as contending in this case, that the law in question is unconstitutional in authorizing the sheriff or his collector to distrain the property of the person assessed with taxes as therein mentioned, if they be not paid. The necessity of such a power, and its constant exercise from time immemorial, as we have seen, places its constitutionality on an impregnable basis. But it seems to be supposed that the law is unconstitutional in authorizing the sheriff or collector, if unable to find sufficient property to satisfy the taxes so assessed, and the same shall not be immediately paid, to arrest the person so assessed and hold him in custody until the payment is made, or until he enter into bond with sufficient security, as therein mentioned. Why should this power to arrest a person so assessed make the law unconstitutional any more than the power to distrain his goods? The ground of the objection is that a person cannot be deprived of his liberty except by the law of the land. But a person cannot be deprived of his property, any more than his liberty, except by the law of the land; and yet it is well settled, and must be admitted, that a person's property may be seized for non-payment of his taxes, upon the mere assessment of the commissioner of the revenue, and without any judgment of any court against him. Why may not his person be arrested for the same cause, when the law expressly authorizes such an arrest? We have seen that the authorities place the seizing of the property, and arresting of the person of the tax debtor, on the same footing, in regard to the constitutional question we are now considering; and so they undoubtedly are. The power to arrest the person may not be so often given by tax laws as the power to distrain property; but a power to arrest the person is often given by such laws, and is sometimes necessary to make them efficient; and whenever it is necessary, the Legislature, which is charged with the important duty of raising a revenue for the support of the government, may constitutionally confer such a power. It is not contrary, as has been shown, to the provision of the Bill of Rights referred to, nor is it contrary to any other provision of the constitution. There is no provision in our constitution, as there is in some of the other State constitutions, which forbids imprisonment for debt. And it is well known that, until a recent period, a person might be imprisoned in this State, not only on final process in a civil action, but on original process in a bailable

action, by a mere endorsement by the plaintiff's attorney on the process, requiring bail. And though the law has been changed in this respect, yet the old law may at any time be restored, at the will of the Legislature. There is nothing in the constitution to prevent it. Even if imprisonment for debt were forbidden by the constitution, such a provision would not, I imagine, forbid imprisonment as a means of enforcing the payment of taxes, if the Legislature found it necessary to resort to such means in order to raise a revenue. But such a question does not arise in this case, and of course is not intended to be decided.

But it is objected that imprisonment might be perpetual under this law, as it makes no provision for the discharge of the prisoner, even though he be insolvent.

If this be true, it may show the law to be harsh in its operation, but does not therefore show it to be unconstitutional. It may be a bad exercise of legislative discretion, but not an excess of legislative power. The courts may control the latter, but have nothing to do with the former.

. . . .

But it is said that the law is harsh, and indeed unconstitutional, in requiring the person arrested to give bond, etc., for his appearance before the Circuit court of his county or corporation, to answer such action of debt, indictment or information, as may be brought against him, and to satisfy, not only the fine imposed, but the taxes assessed.

The law does not require him to give such a bond. He may discharge himself from custody by payment of the tax. What is said about the bond is for his benefit. He may give the bond, and obtain his discharge in that way, if he cannot, or does not, choose to pay the money. There is nothing unreasonable in the condition of the bond which he is thus authorized to give. He has incurred a fine, for which an action for debt, or an indictment, or an information lies, and he also owes the taxes assessed. The condition of the bond is not to pay the fine absolutely, but to answer to such action of debt, indictment or information as *may* be brought against him, and to satisfy the fine imposed; that is, the fine which *may* be imposed on the trial of such action of debt, indictment or information; and also to pay the taxes assessed.

I therefore think the law under which the petitioner was arrested is constitutional.

. . . .

A common method of ensuring the payment of taxes is the imposition of a penalty upon the taxpayer for failure to pay the tax, as e. g., failure

to take out the license made necessary by law for the conduct of a business subjected to a tax, or to do a thing whose performance renders the collection of the tax easier. Cases in this collection of the imposition of such penalties are: Brown v. Maryland, 12 Wheaton 419; Drexel v. Commonwealth, 46 Pa. St. 31; Fairbank v. United States, 181 U. S. 285; Leloup v. Port of Mobile, 127 U. S. 640; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; Osborne v. Florida, 164 U. S. 650; People v. Coleman, 4 Cal. 46; Robbins v. Shelby County Taxing District, 120 U. S. 489; State v. Schlier, 3 Heiskell (Tenn.), 281; Waring v. Mayor, 8 Wallace U. S. 110.

CHAPTER XII.

THE SALE OF LAND FOR UNPAID TAXES.

I. When Land May Be Sold.

BROWN V. VEAZIE.

Supreme Judicial Court of Maine. July, 1845.
25 Maine 359.

Whitman, C. J. It appears, that the tenant claims to hold the demanded premises as mortgagee under Joseph Smith, by deed bearing date, December 28, 1836. The tenant, being in possession, under a title apparently good, he cannot be disturbed, but by a claimant under a title paramount to his. The demandant claims under a sale made for the non-payment of taxes, assessed on the premises, in the town of Orono, in June, 1839. His deed from the collector bears date, May 9, 1840. To substantiate his claim he introduced, at the trial, proof, supposed by him to be sufficient to show the legality of the assessment, and of the proceedings of the collector in making sale of the premises.

Sales of real estate, for the non-payment of taxes, must be regarded, in a great measure, as an *ex parte* proceeding. The owner is to be deprived of his land thereby; and a series of acts, preliminary to the sale, are to be performed to authorize it on the part of the assessors and collector, to which his attention may never have been particularly called; and experience and observation render it notorious, that the amount paid by purchasers, at such sales, is uniformly trifling in comparison with the real value of the property sold. In this very instance the purchaser, at the collector's sale, bought, for less than $17, an estate, valued by the assessors at $900. It has, therefore, been held, with great propriety, that, to make out a valid title, under such sales, great strictness is to be required; and it must appear that the provisions of law preparatory to, and authorizing such sales, have been punctiliously complied with. The counsel for the defendant, in this case, may therefore, be excusable, if not commendable, for the astuteness and searching manner in

which he has scrutinized the doings of those officers, in the instance before us.

. . . .

Collectors have no power to sell lands, by reason of the non-payment of taxes assessed thereon, except in pursuance of the provisions contained in the statutes; and can sell only in the precise cases in which it has been so authorized. The statute of 1821, c. 116, § 30, provides for a sale of real estate for the non-payment of taxes, no one having appeared to pay them, "of unimproved lands of non-resident proprietors;" and of "improved lands of proprietors living out of the limits of the State;" and, § 31, provides for the sale, for the non-payment of taxes, of improved lands of proprietors, living in the State, but not in the town in which such real estate lies, after first giving the proprietor notice in writing, two months prior to proceeding to sell; and by the act, of 1823, c. 229, collectors may sell improved real estate, taxed to the owner thereof, for the non-payment of his tax, assessed thereon, whether he may be living in this State or elsewhere. These are all the cases in which a collector can make a valid sale of real estate, for the non-payment of taxes, assessed thereon.

Now, was the estate in question, in either of these predicaments? It was not, in the first place, unimproved land; for it is apparent, that it was a mere house lot, with a house and stable on it. Secondly, it was not improved land of a proprietor, living out of the State; for the owner lived in Bangor, but ten or twelve miles from it; thirdly, no notice in writing was given to the owner, two months before proceeding to make sale of the estate; and, fourthly, the estate was not, as provided in the statute of 1823, taxed to the owner. It was taxed as belonging to persons unknown. The statute, of 1823, was passed to authorize the taxing of land possessed by a lessee, either to him or to the owner thereof, unquestionably by name. It would not, in common parlance, be taxed to him unless he were named as the person taxed. Being so taxed he would be subject to other modes of enforcing payment, as by arrest, distraint or suit. A tax to persons unknown does not subject the owner to any compulsory process, except by the sale of his land. Property taxed to an individual, therefore, must be understood to be to him by name, and not as a person unknown.

It seems to us to be very clear, that a collector, before he can proceed to sell real estate, taxed to persons unknown, must ascertain whether the estate be improved or not. If improved, he must ascertain whether the owner lives out of the State or not. If he

lives in the State, then, the collector must, before proceeding to sell his land for taxes, give him two months previous notice in writing of his liability. In this case the estate being taxed to owners unknown, and being under improvements, and no such notice having been given, the sale was unauthorized and void.

Plaintiff nonsuit.

SLATER V. MAXWELL.

Supreme Court of the United States. December, 1867.
6 Wallace 268.

Appeal from the District Court for Western Virginia.

Slater filed a bill in that court to compel one Maxwell to release whatever apparent right he, Maxwell, might have acquired to a large tract of land (19,944 acres) in Virginia, under a sale of the same, made in October, 1845, by the sheriff of Ritchie County, for taxes amounting to $30.03, accrued for 1841-2-3-4, and the deeds executed upon such sale.

. . . .

The court below dismissed the bill.

Mr. Justice Field, after stating the case, delivered the opinion of the court as follows:

The relief sought by the bill in this case is put upon three grounds:

1st. That the sale was made at a grossly inadequate price.

2d. That the entire tract was sold in one body; and—

3d. That competition at the sale was prevented by the fraudulent declaration of the defendant, made to effect that purpose, that the complainant would redeem the land from the purchasers.

The inadequacy of the price given at the sale of land for unpaid taxes thereon, does not constitute a valid objection to the sale. The taxes levied upon property generally bear a very slight proportion to its value, and of necessity the whole property must be sold, if a sum equivalent to the amount of the taxes is not bid for a portion of the premises.

The sale of the entire tract in one body would have vitiated the proceeding, if bids could have been obtained upon an offer of a part of the property. In this case the answer avers, and the proof shows, that the sheriff offered to sell a part of each tract without receiving

a bid, and it was only then that the entire tract was put up and struck off to the defendant.

The case must, therefore, turn upon the last ground, the alleged fraudulent declaration of the defendant at the sale, to prevent competition.

The allegation of the bill is, that at the time the land was offered for sale a great many persons were present with a view to purchase small tracts for farming purposes, but the defendant stated to them that the complainant would redeem his land from the purchasers, and in that way put down all competition, and had the entire property struck off to him for the amount of the taxes; and that this conduct was pursued to enable him to buy without competition, for a trifling amount, all the land of the complainant.

The answer of the defendant to the allegation is evasive and unsatisfactory. It is that he has no recollection of making the statement averred, nor does he believe he did, and that he believes the charge to be untrue.

. . . .

Turning now to the testimony presented by the record, we find that the allegation of the bill is sufficiently established.

. . . .

Such being the case there is no doubt that relief should be granted the complainant. It is essential to the validity of tax sales, not merely that they should be conducted in conformity with the requirements of the law, but that they should be conducted with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should be in all such cases strictly exacted. The owner is seldom present, and is generally ignorant of the proceeding until too late to prevent it. The tax usually bears a very slight proportion to the value of the property, and thus a great temptation is presented to parties to exclude competition at the sale, and to prevent the owner from redeeming when the sale is made. The proceeding, therefore, should be closely scrutinized, and whenever it has been characterized by fraud or unfairness should be set aside, or the purchaser be required to hold the title in trust for the owner.

When the objections to a tax deed consist in the want of conformity to the requirements of the statute in the proceedings at the sale or preliminary to it, or in the assessment of the tax, or in any like particulars, they may be urged at law in an action of ejectment, whether the deed be the ground upon which the recovery of the premises is sought by the purchaser, or be relied upon to defeat a

recovery by the owner. In some instances equity will interpose in cases of this kind, as where the deed is by statute made evidence of title in the purchaser, or the preliminary proceedings are regular upon their face, and extrinsic evidence is required to show their invalidity. Where, however, the sale is not open to objections of this nature, but is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief. Thus in *Dudley* v. *Little,* (2 Hammond 504), equity relieved against a tax sale and deed, where there had been a combination among several persons that one of them should buy in the land to prevent competition. (See also Yancey v. Hopkins, 1 Mumford 419; Rowland v. Doty, Harrington's Chancery, 3; Bacon v. Conn, 1 Smedes & Marshall's do. 348.)

It follows from the views expressed that the complainant is entitled to a release from the defendant of all the right and interest acquired by him under the tax deeds in the property owned by the complainant at the time of the sale. The decree of the court below will therefore be REVERSED, and the cause remanded with directions to enter a decree in accordance with this opinion.

Decree accordingly.

PARKER V. OVERMAN.

Supreme Court of the United States. December, 1855.
18 Howard 137.

Mr. Justice GRIER delivered the opinion of the court.

As some doubts were entertained and have been expressed by some members of the court, as to its jurisdiction in this case, it will be necessary to notice that subject before proceeding to examine the merits of the controversy. It had its origin in the state court of Dallas county, Arkansas, sitting in chancery. It is a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff or other public officer. Its object is to quiet title. The purchaser at such sales is authorized to institute proceedings by a public notice in some newspaper, describing the land, stating the authority under which it was sold, and "calling on all persons who can set up any right to the lands so purchased, in consequence of any informality, or any irregularity or illegality connected with the sale, to show cause why the sale so made should not be confirmed."

In case no one appears to contest the regularity of the sale, the court is required to confirm it, on finding certain facts to exist. But if opposition be made, and it should appear that the sale was made "contrary to law," it became the duty of the court to annul it. The judgment or decree, in favor of the grantee in the deed, operates "as a complete bar against any and all persons who may thereafter claim such land, in consequence of any informality or illegality in the proceedings."

. . . .

In the case before us, the proceeding, though special in its form, is in its nature but the application of a well-known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another State. He is therefore entitled to have his suit tried in this court, under the same conditions as in other suits or controversies.

. . . .

What we have already stated sufficiently shows the nature of the present controversy. The decree appealed from "adjudges the absolute title to the land to pass and be confirmed to, and vest in, said William Overman, his heirs, &c., free, clear, and discharged from the claim of said defendants, and all persons whatsoever; and that the said sale thereof for taxes, so made by the sheriff of Dallas county to said Overman, is hereby confirmed in all things, and said defendants perpetually enjoined from setting up or asserting any claim thereto, &c."

The plaintiffs in error allege that this decree is erroneous, and should have been for the defendants below.

As the present controversy is for the purpose of giving an opportunity "to all persons who can set up any right or title to the land so purchased, in consequence of any informality or illegality connected with such sale," to contest its validity, it would be absurd to make the deed, whose validity is in question, conclusive evidence of that fact. Consequently, the statute enacts that in this proceeding "the deed shall be taken and considered by the court as sufficient evidence of the authority under which said sale was made, the description of the land, and the price at which it was purchased. The deed is to be received as *prima facie* evidence of these three facts, and casts the burden of proof as to them on the defendant. The term "sufficient" is evidently used in the statute as a synonym for "*prima facie*," and not for "conclusive."

In judicial sales under the process of a court of general jurisdiction, where the owner of the property is a party to the proceedings,

and has an opportunity of contesting their regularity at every step, such objections cannot be heard to invalidate or annul the deed in a collateral suit. But one who claims title to the property of another under summary proceedings where a special power has been executed, as in case of lands sold for taxes, is bound to show every fact necessary to give jurisdiction and authority to the officer, and a strict compliance with all things required by the statute.

The principal objection to the regularity of the sale in this case, and the only one necessary to be noticed, is, that the land was not legally assessed. A legal assessment is the foundation of the authority to sell; and if this objection be sustained, it is fatal to the deed.

In order to qualify the sheriff to fulfil the duties of assessor, the statute requires that, "on or before the tenth day of January, in each year, the sheriff of each county shall make and file in the office of the clerk of the county an affidavit in the following form," &c.: "And if any sheriff shall neglect to file such affidavit within the time prescribed in the preceding section, his office shall be deemed vacant, and it shall be the duty of the clerk of the county court, without delay, to notify the governor of such vacancy," &c.

The statute requires, also, "that on or before the 25th day of March, in each year, the assessor shall file in the office of the clerk of the county the original assessment, and immediately thereafter give notice that he has filed it," &c. This notice is required, that the owner may appeal to the county court "at the next term after the 25th day of March, and have his assessment corrected, if it be incorrect." If the assessor shall fail to file his assessment within the time specified by this act, he is deemed guilty of a misdemeanor and subjected to a fine of five hundred dollars.

These severe inflictions upon the officer, for his neglect to comply with the exigencies of the act, indicate clearly the importance attached to his compliance in the view of the legislature, and that a neglect of them would vitiate any subsequent proceedings, and put it out of the power of the sheriff to enforce the collection of taxes by a sale of the property.

The record shows that Peyton S. Bethel, the then sheriff of the county of Dallas, did not file his oath as assessor on or before the 10th of January, as required by law. He did file an oath on the 15th of March, but this was not a compliance with the law, and conferred no power on him to act as assessor. On the contrary, by his neglect to comply with the law, his office of sheriff became *ipso facto* vacated, and any assessment made by him in that year was void, and could not be the foundation for a legal sale. The neglect,

also, to file his assessment and give immediate notice on the 25th of March, so that the purchaser might have his appeal at the next county court, was an irregularity which would have avoided the sale even if the assessment had been legally made.

The statute makes the time within which these acts were to be performed material; and a strict and exact compliance with its requirements is a condition precedent to the vesting of any authority in the officer to sell.

We are of opinion, therefore, that the sale of the land of the appellants was "contrary to law," and that the deed from Edward M. Harris, sheriff and collector of Dallas county, to William Overman, set forth and described in the pleadings and exhibits of this case, is void, and should be annulled.

II. Redemption.

GAULT'S APPEAL.

Supreme Court of Pennsylvania. ***1859.***
33 Pennsylvania State, 94.

Appeal from the District Court of Philadelphia.

This was an appeal by Henry W. Gault from the decree of the court below, directing him to reconvey to William L. Schaffer, Charles J. Ellis, and Samuel T. Roberts, certain lots of ground in the city of Philadelphia, which had been sold by the sheriff, under a municipal claim.

. . . .

The opinion of the court was delivered by

Woodward, J. The question that lies at the bottom of this case is, whether the 11th section of the Act of Assembly of 13th May, 1856, P. L. 567, giving owners of lots in Philadelphia two years to redeem from sales made for municipal claims, is to be strictly or liberally construed.

The counsel for the appellant insist, that however just and reasonable this enactment may be in its general operation, yet it ought to be so strictly construed as not to embrace this case, because when the sheriff's sale was made under which he claims, the act of 23d January, 1849, was in force, which allowed but one year for redemption; and to apply the Act of 1856 to this sale, would be to

give it a retroactive and unconstitutional operation. They consider this a sufficient reason to force us upon a strict construction of the statute, and then they argue, with conclusive effect, that neither the parties nor the case are within the statute.

But are we shut up to a strict construction of the enactment? What is its nature and tendency? If we apply it to the case before us, do we give it retroactive effect, or render it unconstitutional?

These are interesting and important questions, and we have given them a very attentive consideration.

The enactment is a redemption law. It gives to the owner of a vacant lot sold for taxes in Philadelphia, the same time for redemption that the Act of 1815 gives to the owner of unseated lands sold for taxes in the rural counties. It is, therefore, favorable to the rights of property, and congenial to the spirit of our general legislation. The right of the government to authorize the seizure and sale of land without notice to the owner, was seriously doubted, and sometimes stoutly denied, in the early history of tax sales in Pennsylvania; and the only ground on which it can be maintained, is the absolute sovereignty of the State in the exercise of its taxing power.

But it is a severe exercise of power. To divest ownership, without personal notice, and without direct compensation, is the instance in which a constitutional government approaches most near to an unrestrained tyranny. Whatever tends to modify this right is favorable to the citizen, and ought to be liberally construed, on the principle that remedial statutes are to be beneficially expounded.

Redemption is the last chance of the citizen to recover his rights of property, and yet, it is here, at the point of the owner's extremity, the appellant's argument would have us apply strictness of construction to a statute made for the owner's relief. The *owner* may redeem, says the statute; but, says the appellant, those who offered to redeem on the 15th September, 1858, were not owners at the time of the sale, but became owners afterward.

The *purchaser shall reconvey,* says the statute; but the appellant points to the fact, that Raimond was the purchaser at the sheriff's sale, and conveyed to him, Gault, who is not the purchaser within the meaning of the statute, and therefore not subject to a decree to reconvey. The act applies to sales by *the City,* and the appellant says this was a sale by the district of Penn.

Now, however, we might be disposed to lay hold of such criticism to prevent the operation of a statute which proposed to *divest* titles, they are not to arrest a statute which has for its object the *restora-*

tion of a title to its real owner. This would be hypercriticism in the wrong direction. We hold him to be an owner within the statute who is such when he offers to redeem. The sale left in the former owner an equity of redemption at the least, and that might be conveyed like any other estate, and the grantee took it with all the rights and capacities of the grantor. He is therefore the "owner" who holds the title at the moment of redemption. Nor is the statute to be defeated by the purchaser at the public sale conveying his rights to another before the time of redemption. If Raimond took from the sheriff a legal title, and conveyed it to Gault, it was, nevertheless, a defeasible title—liable to be defeated by a redemption within time—as much so in the hands of Gault as in those of Raimond. And it was a sale by the city. The Consolidation Act had made the district of Penn part of the city, and on the face of the record the proceedings were in the corporate name of the district to the use of the city. At the time of the sale, therefore, the city stood as the beneficial party upon the record—and that was enough to answer the terms of the statute.

Thus it is apparent, that it does not require a very large stretch of construction, to bring the case within this remedial statute; and such as it does require, we feel quite justified in making.

For these reasons we are clear in ruling that this was not a sale made prior to the Act of 1856, and that we give the act no retroactive effect in applying it as we do.

. . . .

The decree is affirmed.

But to redeem the owner must bring himself within the provisions of the statute. Thus he must redeem within the time provided. Nothing will excuse delay beyond the allotted time, not even the existence of civil war. Finley v. Brown, 22 Iowa 538. The only possible excuse would be fraud on the part of the tax purchaser. Blanton v. Ludding, 30 La. An. 1232.

BENNETT V. HUNTER.

Supreme Court of the United States. December, 1869.
9 Wallace 326.

By an act of August 5th, 1861, (12 Stat. at Large 294) passed in quite the early part of the late rebellion, Congress having laid a duty on incomes, imposed a direct tax of $20,000,000 per annum upon the whole of the United States, of which a certain sum was apportioned to Virginia. . . . . .

Afterwards, however, the rebellion having now become widespread, and assumed far greater magnitude, an act of June 7th, 1862, (Ib. 422), declared that when in any State the civil authority of the government of the United States should be obstructed by insurrection or rebellion, so that the provisions of the former statute could not be peaceably executed, the direct taxes apportioned by that statute should be apportioned and charged in each State wherein the civil authority was thus obstructed, upon all the lands situate therein, respectively, &c., as the same were enumerated and valued under the last assessment and valuation thereof made under the authority of said state or territory previous to January 1st, 1861; and every parcel of the said lands, according to the said valuation, was declared to be charged, by virtue of the act itself, with the payment of so much of the whole tax laid and apportioned by said act upon the State wherein the same was situate, as should bear the direct proportion to the whole amount of the direct tax apportioned to said State as the value of said parcels of land should, respectively, bear to the whole valuation of the real estate in the said State, according to the said assessment and valuation made under the authority of the same, and in addition thereto with a penalty of fifty per centum of said tax.

The 3d section allowed the *owner* or *owners* of the lands, *within sixty days* after the amount of the tax charged thereon, respectively, should have been fixed by a board of tax commissioners (the appointment of which was provided for by the act), to pay the same to the commissioners, and take a certificate thereof, by virtue of which the lands should be discharged from the tax.

. . . .

Under this act of the 7th of June, 1862—the second of the acts above mentioned—a tax was assessed upon a tract of land situate in Alexandria County, Virginia, of which one B. W. Hunter was then owner for life, the property in remainder being in his son, and default having been made in payment, the land was advertised for sale. After advertisement, but before sale, the amount of the taxes, expenses, penalties, and costs (the whole being within $100), was tendered *by a tenant in occupation of about half of the premises,* to the commissioners appointed for the collection of taxes under the act, who refused to receive the money, upon the ground that the tender was not made by the owner of the land in person. The land was then, January 11th, 1864, sold, and one Chittenden became the purchaser, and received a certificate from the commissioners, reciting the sale and his purchase for $8000. He thereupon leased

the property to one Bennett, who went into possession. After the close of the war, Hunter, the son, who had served as an officer in the rebel army, but against whose property no proceedings for confiscation had been instituted, and whose estate in remainder had now become absolute, brought suit in one of the State courts of Virginia to recover possession of the land. No question was made of his right to recover if his title was not divested by the sale for taxes. The court in which the suit was brought gave judgment in his favor, and the judgment being affirmed by the Supreme Court of Appeals of the commonwealth, the other side brought the case here for review.

. . . .

The CHIEF JUSTICE (CHASE) delivered the opinion of the court.

The case requires the consideration and determination of one point only, namely, whether the commissioners under the act could make a sale for taxes, notwithstanding a previous tender of the amount due?

In order to a right understanding of the real point in controversy, however, it will be useful to notice briefly the occasion and the objects of the enactments which have given rise to it.

The necessities of the war arising from the rebellion, demanded immediate provision of adequate funds. For this purpose Congress increased the duties on customs, imposed a duty on incomes, and laid a direct tax of twenty millions of dollars upon lands. This latter tax was apportioned, agreeably to the direction of the Constitution, among the several States, in proportion to their respective numbers; and it was provided that, if the act could not be carried into execution in any State in consequence of rebellion, it should be the duty of the President to proceed, as soon as the authority of the United States should be re-established therein, to collect both the land tax and the income tax, with six per cent interest.

The income tax thus imposed has never been collected; but provision was made by the act of June 7th, 1862, for the collection of the land tax in the insurgent States. This act, or some similar provision, to enable the President to perform the duty devolved upon him by the act of 1861. The acts of 1861 and 1862 are, therefore, to be construed together. The general object of both was the same, namely, the raising of revenue by a tax on land. The first prescribed a mode of collection where the authority of the General Government was acknowledged, and no serious obstacle existed to the execution of the law; the second directed the mode of collection where this authority had been overthrown by insurrection, and had

been sufficiently re-established to make collection, to some extent at least, practicable.

The provisions of the latter were necessarily adapted to the peculiar circumstances in which it was to be executed, and were in most respects more stringent than those of the former. The first act, for example, directed the assessment of lands by assessors to be appointed under it; the second adopted the valuation made under the authority of the several States prior to the rebellion, and charged directly upon each parcel of land its proportion of the tax apportioned to the State. Under the first act, delinquent tax-payers were permitted, at any time after advertisement for sale, and before actual sale, to pay the amount assessed with ten per cent penalty, and thus relieve their lands. The second act imposed on each tract, without respect to delinquency on the part of the owner, a penalty of fifty per cent in addition of its proportion of the tax upon the State, and, it is contended, allowed payment only within sixty days after assessment. In the earlier act indulgent provision was made for redemption after sale; in the latter, onerous conditions were imposed on such redemption.

Without adverting further to particular points of difference between the two acts, it may be observed that their most striking contrast was in their practical application.

The several adhering States, under the act of 1861, assumed and paid their respective quotas, and collected the amount of the tax from their own citizens under their own laws, so that in those States the machinery of the law was never really put in action; while in the insurgent States the act of 1862, so far as it was executed at all, was carried into effect according to its terms by the officials of the National government. In this way, the citizens of the adhering States were relieved from the process of collection and from penalties and forfeitures for non-payment, while the citizens of the insurgent States who could not be thus relieved were exposed to their unmitigated operation.

Keeping these circumstances in view, we are to consider the effect of the sale for taxes made, as we have already stated, to the lessor of the plaintiff. And this must depend mainly upon the construction to be given to the fourth section of the act of 1862.

This section provides "that the title of, in, and to each and every piece and parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States; and upon the sale hereinafter provided for shall vest in the United States, or in the purchasers at such sale, in fee simple, free

and discharged from all prior liens, incumbrances, right, title, and claim whatsoever."

And we are first to consider whether the first clause of this section, *proprio vigore,* worked a transfer to the United States of the land declared to be forfeited.

. . . .

Now the general principles of the law of forfeiture seem to be inconsistent with such a transfer. Without pausing to inquire whether in any case, the title of a citizen to his land can be divested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction (Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 625). In the case of lands forfeited by alienage the king could not acquire an interest in the lands except by inquest of office (3 Bl. Com. 258). And so of other instances, where the title of the sovereign was derived from forfeiture. And in the case of *The United States v. Repentigny,* (5 Wallace 265), where the forfeiture to the government of lands arose from omission to perform the conditions of the grant, this court held that before the forfeiture could be consummated by reunion of the land with the public domain, "a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent," should take place. The court said further that "a legislative act directing the possession and appropriation of the land is equivalent to office found."

Applying these principles to the case in hand, it seems quite clear that the first clause of the fourth section was not intended by Congress to have the effect attributed to it, independently of the second clause. It does not direct the possession and appropriation of the land. It was designated, rather, as we think, to declare the ground of the forfeiture of the title, namely, non-payment of taxes, while the second clause was intended to work the actual investment of the title through a public act of government in the United States, or in the purchaser at the tax sale. The sale was the public act, which is the equivalent of office found. What preceded the sale was merely preliminary, and, independently of the sale, worked no divestiture of title. The title, indeed, was forfeited by non-payment of the tax; in other words, it became subject to be vested in the United States, and, upon public sale, became actually vested in the United States or in any other purchaser; but not before such public sale.

It follows that in the case before us the title remained in the tenant for life with remainder to the defendant in error, at least until sale; though forfeited, in the sense just stated, to the United States.

But it has been insisted that the right to pay the tax and relieve the land from sale expired at the end of sixty days after the amount was fixed by the proper authority. It does not appear when the amount was fixed, or when the sixty days ended. It may be inferred, perhaps, from the fact of sale, that default for payment had continued at least through that time, for otherwise there could have been no power to sell.

If this inference be admitted, however, it by no means follows that the right to pay the tax and have the land discharged from it expired with the sixty days. It is more reasonable to suppose that this right remained as long as the title of the land remained in the owner—that is, until after sale. And this view is confirmed by reference to another part of the act. The seventh section gives direction as to sales, the issue of certificates of sale to purchasers, and proceedings for redemption after sale, and then provides that "the certificate of sale shall only be affected, as evidence of the regularity and validity of sale, by establishing the fact that the land was not subject to taxes, or that the taxes had been paid previous to the sale, or that the property had been redeemed according to the provisions of this act." This provision makes it clear that proof of payment of taxes prior to the sale invalidates the certificate, and this could not be unless the right to pay the tax continued until the sale. This seems to leave no doubt on the point that the right to make such payment was not strictly limited to sixty days after the fixing of the amount of the tax.

But to whom did the right to make this payment belong? The obvious answer is, to the owner, either acting in person or through some friend or agent, compensated or uncompensated. The terms of the act are, that the owner or owners may pay; and it is familiar law that acts done by one in behalf of another are valid if ratified either expressly or by implication, and that such ratification will be presumed in furtherance of justice.

But it is insisted that the right of payment is limited by the act to the actual owner in his proper person. But we perceive no such limitation in its terms. On the contrary, the fact that the privilege of redemption after sale is limited to the owner or the loyal person having a lien or other interest, appearing in proper person and taking a prescribed oath, appears to us to afford an irresistible infer-

ence that the right of payment before sale is not so limited. It is a right which, under the act, belongs to the owner, and no oath is required in order to its exercise. It is a right to be exercised under the act as a law for raising revenue. It is expressly distinguished from the privilege of redemption after sale and complete divestiture of title, which is accorded upon very different principles, and in pursuance of a very different policy. We cannot doubt that it might properly be exercised by the owner in person, or through any other person willing to act in his behalf and not disavowed by him.

The application of these principles decides the case before us. The title and possession of the land, at the time of assessment, was in B. W. Hunter for life, with remainder in fee to his son, the defendant in error. The life estate terminated, and the fee became vested in 1864. The sum due the United States for taxes, penalty, and costs, was tendered to the commissioners before sale, and it was their duty to accept it. The tender was not objected to as insufficient, but was refused solely because not made by the owner in person. The refusal not being warranted by the act, the tender must be held good. The certificate of sale under which the plaintiff in error claims title cannot, therefore, be sustained. The sale must be regarded in law as having been made after the payment of the tax, and as insufficient to vest the title to the land in the purchaser.

It follows that the judgment of the court of appeals of Virginia must be

Affirmed.

III. Effect of Tax Deed.

TURNER V. SMITH.

Supreme Court of the United States. December, 1871.
14 Wallace 553.

Hannon being owner in fee simple and free from lien of a house and lot in Alexandria, granted out of it by an old-fashioned formal ground-rent deed, with clause of right of re-entry, etc., in 1819, a rent charge of $224 to Moore, with right of distress, re-entry, etc. In 1821 Hannon died insolvent, and the rent not being paid, Moore "took possession" of the house again, though in what mode or whether with any of the requisites of a common law re-entry did not appear.

In 1825, being still in possession, he conveyed the rent charge, describing it in form, to one Irwin, and Irwin in 1854 conveyed it, *with the lot on which it was charged* to R. M. and J. M. Smith; Irwin and Smith, each respectively, being in possession of the house and lot, after they became owners of the rent, as Moore had, himself, been after Hannon's decease; and each paying the taxes assessed against the house and lot while he held it.

In May, 1861, on the outbreak of the rebellion, Smith abandoned his residence and went within the rebel lines.

On the 5th of August of that year (12 Statutes at Large 294), Congress passed an act laying a "direct tax of $20,000,000 annually upon the United States," and apportioning the same in a manner which is set forth, among the several States. The act provided particularly for assessing and collecting of the tax, directing that it should be collected from persons at their dwellings, in the first instance; and if not paid should be obtained by distress and sale of personal property; and if persons could not be found, and there was no personal property, then, "by public sale of so much of the said property as shall be necessary to satisfy the taxes due thereon, together with an addition of 20 per cent." The act then provided for giving a deed, *but did not in any part declare what should be the effect of the sale or deed, or that it should divest liens of any kind.*

The act authorized each State to assume, assess, collect, and pay its quota of the tax; and the loyal States did do this. In the rebel States nothing could be done.

On the 7th of June, 1862 (Ib. 423), Congress passed another act, entitled "An Act for the Collection of Direct Taxes in Insurrectionary Districts, &c."

. . . .

On the 6th of February, 1863 (12 Stat. at Large, 640), Congress passed a short "act to amend" this act, and entitled "An Act for the Collection of Direct Taxes in Insurrectionary Districts, &c."

. . . .

With these statutes on the statute-book, and the property in Alexandria, mentioned at the beginning of this statement, being assessed on the land-book of Virginia, on the 1st of March, 1864, at $3,500, the tax commissioners of the United States (not themselves bidding at all) sold it, in professed pursuance of the acts of Congress, for $1,750 (less than two-thirds, $2,333, of its assessed value) to one Turner, describing it as a house on Royal Street, between King and Prince Streets, at Alexandria, in the State of Virginia, *"said to have*

belonged to R. M. and J. M. Smith" and charged to them on the land-book of the State aforesaid for the year 1860.

The rebellion being suppressed the Smiths—*never having offered as "holders of a valid lien" or otherwise to redeem*—brought suit in proper form against Turner to recover certain arrears of the ground-rent. Turner claimed title to the lot free of rent under the sale for taxes made by authority of the several acts of Congress already mentioned for imposing and collecting a direct tax. The decision of the court where the suit was brought was *against* the title thus set up, that is to say, it was in favor of the Smiths, and their rent, and this decision being affirmed in the highest court of the State (18 Grattan 835) the case was here for review.

Mr. Justice MILLER delivered the opinion of the court.

Two propositions are relied on to defeat the title under the sale for taxes.

. . . .

2. That the plaintiffs below in whose favor the judgment was rendered, were the owners of a rent charge on the land, which was not extinguished by the sale for the unpaid taxes.

. . . .

2. In the act of August 5, 1861, apportioning the tax of $20,000,000 among the States, according to population, provision is made for its collection out of the lands within those States, if not paid by the States. Under the provisions of that act it might admit of some doubt whether the tax was in its essence a tax on the land, and on all the various estates in which the fee may have been divided, or was a tax on the owner of the land, and levied on the interest of the owner in it, and on no other subordinate or incorporeal interest. But no tax was ever collected, or any land sold under that act. The States which, in the war for the support of which this tax was levied supported the General Government, assumed and paid the portion allotted to each. With regard to the States which were in insurrection, Congress passed a new law for the assessment and collection of their portion, under which the sale in this case was made. That act, the statute of 1862, to which we have already referred, directed the commissioners to whom the collection of the tax was intrusted, to take the last assessment of the value of the lands made in each State for State taxation as the basis on which the tax charged to that State by the act of 1861 should be apportioned among the several lots and parcels within that State, and a penalty of fifty per cent was added in each case for non-payment. The President was directed to declare by his proclamation what States

or parts of States were in insurrection, and "thereupon the said several lots or parcels of land became charged respectively with their respective portions of said direct tax, and the same, together with the penalty, became a lien thereon, without any further proceedings whatever." Section three gave a time in which this tax might be paid, and section four proceeds to say that "the title of, in and to each and every parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for shall vest in the United States, or in the purchaser at such sale, in fee simple, free and discharged from *all liens,* incumbrances, right, title, and claims whatsoever."

There is nothing in the statute which requires the tax commissioners to hunt up the owner, or to make the tax out of personal property of his, or which may be found upon the land. It is clearly a direct tax on the land, and on all the estates, interests, and claims connected with or growing out of the land. All this was forfeited to the United States on non-payment of the taxes, and passed with the sale to the purchaser, subject alone to the right of redemption, which the law allowed. In that respect it was a defeasible title, but in all other respects perfect, complete and entire. The language of the statute is explicit to this purport, and the policy and necessity of the government, which could not look after the fugitive and hostile owners, required such a tax, and such a mode of collecting it.

We are of opinion, therefore, that the sale being a valid one the rent charge of the defendant in error was cut off and destroyed by it.

JUDGMENT REVERSED, and the cause remanded for further proceedings IN CONFORMITY TO THIS OPINION.

But if land is assessed merely to a resident owner, a report is made of his delinquency and there are no proceedings *in rem;* what is sold may be the interest of the owner only. Dunn v. Winston, 31 Miss. 135.

WILLIAMS V. PAYTON'S LESSEE.

Supreme Court of the United States. February 1819.
4 Wheaton, 77.

The opinion of the court was delivered by Mr. Chief Justice MARSHALL.

This is an ejectment brought in the Circuit Court for the district of Kentucky, by the original patentee, against a purchaser at a sale made for non-payment of the direct tax, imposed by the act of Congress of the 14th of July, 1793, c. 92. After the plaintiff in the Circuit Court had exhibited his title, the defendant gave in evidence the books of the supervisor of the district, showing, that the tax on the lands in controversy had been charged to the plaintiffs, and that they had been sold for the non-payment thereof. They also gave in evidence a deed executed by the Marshal of the district, in pursuance of the act of March 3d, 1804, and proved by Christopher Greenup, the agent of the plaintiff, that there were tenants on the land, and that he did not pay the tax, nor redeem the land.

Upon this evidence, the Court, on the motion of the plaintiff, instructed the jury, "that the purchaser under the sale of lands for the non-payment of the direct tax, to make out title, must show that the collector had advertised the land, and performed the other requisites of the law of Congress, in that case provided, otherwise he made out no title." The defendants then moved the Court to instruct the jury "that the deed and other evidence produced by them, and herein mentioned, was *prima facie* evidence that the said land had been advertised, and the other requisites of the law of Congress, as to the duty of the collector, in that respect, had been complied with"; but the Court refused to give the instruction; and, on the contrary, instructed the jury, "that said deed, and other evidence, was not *prima facie* evidence that the said land had been advertised according to law, nor that the requisites of the law had been complied with."

The defendants excepted to this opinion. The jury found a verdict for the plaintiff, and the judgment rendered on that verdict is now before this Court on writ of error.

As the collector has no general authority to sell lands at his discretion for the non-payment of the direct tax, but a special power to sell in the particular cases described in the act, those cases must exist, or his power does not arise. It is a naked power, not coupled with an interest; and in all such cases, the law requires that every

pre-requisite to the exercise of that power must precede its exercise; that the agent must pursue the power, or his act will not be sustained by it.

This general proposition has not been controverted; but the plaintiffs in error contend, that a deed executed by a public officer, is *prima facie* evidence, that every act which ought to precede that deed had preceded it. That this conveyance is good, unless the party contesting it can show that the officer failed to perform his duty.

It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends upon an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title. If this be true in general, is there anything which will render the principle inapplicable to the case of lands sold for the non-payment of taxes? In the act of Congress, there is no declaration that these conveyances shall be deemed *prima facie* evidence of the validity of the sale. Is the nature of the transaction such, that a Court ought to presume in its favor anything which does not appear, or ought to relieve the party claiming under it from the burthen of proving its correctness?

The duties of the public officer are prescribed in the 9th, 10th and 13th sections of the act of the 14th of July, 1798, c. 92. If these duties be examined, they will be found to be susceptible of complete proof on the part of the officer, and consequently on the part of the purchaser, who ought to preserve the evidence of them, at least, for a reasonable time. Their chief object is to give full notice to the proprietor, and furnish him with every facility for the voluntary payment of the tax, before resort should be had to coercive means. In some instances the proprietor would find it extremely difficult, if not impracticable, to prove that the officer had neglected to give him the notice required by law. It is easy, for example, to show that the collector has posted up the necessary notifications in four public places in his collection district, as is required by the 9th section, but very difficult to show that he has not. He may readily prove that he has made a personal demand on the person liable for the tax, but the negative, in many cases, would not admit of proof.

The 13th section permits the collector, when the tax shall have

remained unpaid for the term of one year, having first advertised the same for two months in six different public places within the said district, and in two gazettes in the State, if there be so many, one of which shall be the gazette in which the laws of such State shall be published by authority, if any such there be, to proceed to sell, &c.

The purchaser ought to preserve these gazettes, and the proof that these publications were made. It is imposing no greater hardship on him to require it, than it is to require him to prove, that a power of atttorney, in a case in which his deed has been executed by an attorney, was really given by the principal. But to require from the original proprietor proof that these acts were not performed by the collector, would be to impose on him a task always difficult, and sometimes impossible to be performed.

Although this question may not have been expressly, and in terms decided in this Court, yet decisions have been made which seem to recognize it. In the case of *Stead's Executors* v. *Course* (4 Cranch 403), in which was drawn into question the validity of a sale made under the tax laws of the State of Georgia, this Court said, "it is incumbent on the vendee to prove the authority to sell." And in *Parker* v. *Rule's Lessee* (9 Cranch 64), where a sale was declared to be invalid, because it did not appear in evidence, that the publications required by the 9th section of the act, had been made, the Court inferred, that they had not been made, and considered the case as if proof of the negative had been given by the plaintiff in ejectment. The question, whether the deed was *prima facie* evidence it is true, was not made in that case; but its existence was too obvious to have escaped either the Court or the bar. It was not made at the bar, because counsel did not rely on it, nor noticed by the judges, because it was not supposed to create any real difficulty.

It has been said in argument, that in cases of sales under the tax laws of Kentucky, a deed is considered by the Courts of that State, as *prima facie* evidence that the sale was legal. Not having seen the case or the law, the Court can form no opinion on it. In construing a statute of Kentucky, the decisions of the Courts of Kentucky would unquestionably give the rule by which this Court would be guided; but it is the peculiar province of this Court to expound the acts of Congress, and to give the rule by which they are to be construed.

Judgment affirmed with costs.

As to the conclusiveness of tax deeds see McCready v. Sexton, 29 Iowa 356, *supra*.

CHAPTER XIII.

TAXATION OF BUSINESS AND PRIVILEGE.

I. Police and Taxing Power.

YOUNGBLOOD V. SEXTON.

Supreme Court of Michigan. October, 1875.
32 Michigan, 406.

Cooley, J. The bill in this cause was filed to restrain the collection from the several complainants of a tax assessed against them separately, in respect to the business in which each is engaged.

. . . .

5. The objection which appears to be principally relied upon is, that a tax on the traffic in liquors under this law is equivalent to a license of the traffic, and therefore comes directly in conflict with that provision of the constitution which declares that "the legislature shall not pass any act authorizing the grant of license for the sale of ardent spirits or other intoxicating liquors." *Const., Art. IV., Sec. 47.*

. . . .

Does, then, a tax upon the traffic in liquors come within the condemnation of this provision of the constitution, as being equivalent to a license of the traffic? Is it the same in legal effect, or is it the same according to the popular understanding of the term license? This is the question that presents itself for decision on this branch of the case.

The popular understanding of the word license undoubtedly is, a permission to do something which without the license would not be allowable. This we are to suppose was the sense in which it was made use of in the constitution. But this is also the legal meaning. "The object of a license," says Mr. Justice Manning, "is to confer a right that does not exist without a license." *Chilvers* v. *People,* 11 Mich. 43, 49. Within this definition, a mere tax upon the traffic cannot be a license of the traffic, unless the tax confers some right to carry on the traffic which otherwise would not have existed. We do not understand that such is the case here. The

very act which imposed this tax repealed the previous law, which forbade the traffic and declared it illegal. The trade then became lawful, whether taxed or not; and this law, in imposing the tax, did not declare the trade illegal in case the tax was not paid.

So far as we can perceive, a failure to pay the tax no more renders the trade illegal than would a like failure of a farmer to pay the tax on his farm render its cultivation illegal. The State has imposed the tax in each case, and made such provision as has been deemed needful to insure its payment; but it has not seen fit to make the failure to pay a forfeiture of the right to pursue the calling. If the tax is paid, the traffic is lawful; but if not paid, the traffic is equally lawful. There is consequently nothing in the case that appears to be in the nature of a license. The state has provided for the taxation of a business which was found in existence, and the carrying on of which it no longer prohibits; and that is all.

But it is urged that by taxing the business the state recognizes its lawful character, sanctions its existence, and participates in its profits—all of which is within the real intent of the prohibition of license. The lawfulness of the business, if by that we understand merely that it is no longer punishable, and is capable of constituting the basis of contracts, was undoubtedly recognized when the prohibitory law was repealed; but as the illegality of the traffic depended on that law, so its lawfulness now depends upon its repeal; the tax has nothing to do with it whatever.

Now it is not claimed, so far as we are aware, that the repeal of the prohibitory law was incompetent; and if not, the mere recognition of the lawfulness of the traffic cannot make the tax or any other law invalid. It is only the recognition of an existing and a conceded fact, and the courts cannot, if they would, refuse to recognize it.

The idea that the state lends its countenance to any particular traffic by taxing it, seems to us to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that must always underlie taxation. Taxes are not favors; they are burdens; they are necessary, it is true, to the existence of government, but they are not the less burdens, and are only submitted to because of the necessity. It is deemed advisable to make careful provision to preclude these burdens becoming needlessly oppressive; but it is conceded by all the authorities, that under some circumstances they may be carried to an extent that will be ruinous to individuals. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the government when this

burden, which may prove disastrous, is imposed upon it, while, on the other hand, it is frowned upon and condemned when the burden is withheld. . . . And the taxation of a thing may be, and often is when police purposes are had in view, a means of expressing disapproval instead of approbation of what is taxed.

There has undoubtedly been felt and expressed a strong sentimental objection to the doing of anything by the state that even seemed to be a lending of its countenance to a business which the objectors regarded as an evil in itself; especially to the state participating in the profits of a pernicious trade. But the objection never found expression in laws forbidding the taxation of liquors or of the business of dealing in them. Indeed, in this state liquors have always been taxable as property; and so have been the implements by means of which forbidden games of chance have been carried on. Yet when the keeper of billiard tables is compelled to pay a tax, it can be no defense to him, either in law or in morals, that he is compelled to do so from the profits of an illegal business. To refuse to receive the tax under such circumstances would tend to encourage the business, instead of restraining it; and would not only be unwise because of exempting one man from his fair share of taxation, but also because it would tend to defeat the state policy which forbids games of chance and hazard. The idea that a thing is favored because it is taxed may be examined in the light of the practice of this state in some other particulars. It has always been the custom in apportioning taxes by valuation to make some discrimination based on reasons of public policy. As an illustration we may mention the case of property devoted to educational or charitable purposes, and which as a rule has been exempted from the general taxation. The general belief has been, that the interests and welfare of the whole community would be best subserved by abstaining from any imposition of the burdens of government upon such property; and the legislature in apportioning the taxes has accepted this general belief and acted upon it. . . . While in the selection of subjects for taxation, revenue is to be considered and kept in view, it is impossible to exclude other considerations. In proposing a tax it might always be a question whether it should be imposed upon persons, or upon property by value, and if so, upon what property, or upon business; and if so, what kind of business, or whether it should not be a combination of all these. One method might be the easiest for the collection of the necessary revenue, but most injurious or unequal in its result; one might discourage industry and another encourage it; one might collect the tax from luxuries, and therefore fall mainly

upon the rich, while another would collect it from necessaries and be oppressive to the poor. The whole question would be quite as much one of policy as of necessity, and a legislator would be unfit for his office who did not look beyond the proposed tax to its probable results. This is especially true in every case where the tax has reference to police as well as revenue. A particular business may then be taxed while others are spared, not only because for any reason it can best bear the burden, but also because such surroundings attach themselves to the business taxed as to render the discouragement and discipline of heavy taxation wise and politic. In the few cases in which the right to do this has been denied on the ground of inequality, the courts have affirmed it as being beyond question. See *Durach's appeal*, 62 *Penn. St.* 491, 494; *Fletcher* v. *Oliver*, 25 Ark. 289; *State* v. *Parker*, 32 N. J. 426, 431. The federal government has gone to a great extent in the same direction, levying duties in some cases which in their results are prohibitory; and in the case of the state banks purposely taxing them out of existence. *Veazie Bank* v. *Fenno*, 8 Wall. 533. This case does not call for any expression of opinion upon legislation of that extreme character, for we have nothing in this law that goes beyond the ordinary legislation when it is enacted for the double purpose of revenue and regulation.

This state has never shown any disinclination to make things morally and legally wrong contribute to the public revenue when justice and good morals seemed to require it. If it were to act upon the idea of refusing to derive a revenue from such sources, it ought to decline to receive fines for criminal offenses with the same emphasis that it would refuse to collect a tax from an obnoxious business. If the tax is laid by way of discouragement or regulation, it has the same general object in view with the fine; not only as it effects the person taxed and the community, but also in the use to which the money is devoted. Yet the constitution expressly provides for a library fund to be derived from the violations of the public law (*Constitution, Art. XIII., Sec. 12*), a provision that may as legitimately be said to be a license of crime, as a tax on traffic may be said to be a license of the traffic.

Taxes upon business are usually collected in the form of license fees; and this may possibly have lead to the idea that seems to have prevailed in some quarters, that a tax implied a license. But there is no necessary connection whatever between them.

A business may be licensed and yet not taxed, or it may be taxed and yet not licensed. And so far is the tax from necessarily being a license, that provision is frequently made by law for the taxation of

a business that is carried on under a license existing independent of the tax.

Such is the case where cities, under proper legislative authority, tax occupations which are carried on under licenses from the state,—*Ould* v. *Richmond,* 23 Grat., 464; *Napier* v. *Hodges,* 31 Texas, 287; *Cuthbert* v. *Conly,* 32 Geo., 211; *Wendover* v. *Lexington,* 15 B. Monr., 258; see also *Home Ins. Co.* v. *Augusta,* 50 Geo., 530. The license confers a privilege, but it is not perceived why a privilege thus conferred should not be taxed as much as any other. The federal laws give us illustration of the taxation of illegal traffic. A case in point was that of the taxation of the liquor traffic in this state previous to the repeal of the prohibitory law; the federal law found a business in existence and it taxed it without undertaking to give it any protection whatever. *McGuire* v. *Com.* 3 Wall., 387; *Pervear* v. *Com.,* 5 Wall., 475. What would have prevented the state from taxing the same traffic at the same time? Is it any more restricted in the selection of subjects of taxation than the general government is? If one may tax and at the same time refuse to protect may not the other do the same? The only reason suggested for a negative reply to these questions is, that it was the state itself, not the United States, that made the business illegal, and it would be inconsistent and absurd to declare it illegal and at the same time tax it. But how the inconsistency would appear in one case rather than the other is not apparent. The illegality was declared by competent authority, and yet the federal government taxed the trade, at the same time refusing, or being unable to protect it. If protection because of the tax was due to the very thing upon which the tax was imposed, there would be an inconsistency in taxing a prohibited trade; but treating taxation, however and wherever it may fall, as the return for the general benefits of government,—for the protection of the life, liberty, the social and family relations, as well as to business and property,—which is the only legal and proper idea of taxation, there is no inconsistency whatever in making a thing which is not protected one of the measures or standards by which to determine how much the party owning or supporting it ought to pay the government. If one puts the government to special inconvenience and cost by keeping up a prohibited traffic or maintaining a nuisance, the fact is a reason for discriminating in taxation against him; and if the tax is imposed on the thing which is prohibited, or which constitutes the nuisance, the tax law, instead of being inconsistent with the law declaring the illegality, is in entire harmony with its general purpose and may sometimes be even more effectual. Certainly, whatever discriminations are made in taxation ought to be in the direction

of making the heaviest burdens fall upon those things which are obnoxious to the public interests, wherever that is practicable.

For these reasons we think the objections which have been made to the law have no validity.

The decree of the superior court dismissing the bill will be affirmed, with costs.

The other Justices concurred.

II. What is a Privilege?

PORTLAND BANK V. APTHORP.

Supreme Judicial Court of Massachusetts, May, 1815.
12 Massachusetts, 252.

Parker, C. J. This cause was argued altogether upon the question, whether the act of the legislature, passed June, 1812, exacting one per cent. per annum upon the capital of all banks, which should be in operation after the first day of the then ensuing October, could legally and constitutionally be applied to those banks, (of which the *Portland* bank is one) whose charters existed prior to the passing of that act.

. . . .

The words of the constitution, from which the authority of the legislature to impose taxes and to obtain a revenue is derived, are—"to impose and levy *proportionate* and *reasonable* assessments, rates and taxes upon all the inhabitants of, and persons resident, and estates lying within the commonwealth; and also to impose and levy *reasonable duties* and *excises,* upon any produce, goods, wares and merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same."

Under the first branch of this power *viz.* that of imposing and levying rates and taxes, the requisition upon the banks cannot be justified; for those taxes must be proportional upon all the inhabitants of, persons resident, and estates lying, within the commonwealth. The exercise of this power requires an estimate or valuation of all the property in the commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the constitution.

But there are other sources of emolument and profit, not strictly

called property, but which are rather to be considered as the means of acquiring property; from which a reasonable revenue may be exacted by the legislature, within the fair meaning of the other branches of the power above recited. The exercise of this power is called the imposing or levying of duties and excises; and the subjects upon which they are to be levied are produce, goods, wares, merchandise and *commodities,* brought into, produced, manufactured, or being within the state. The former provision seems to be intended as a contribution of the individual citizens, in proportion to the property, whether real or personal, which they are respectively worth. The latter is a tax upon the articles, whoever may be the owner, or into whose hands soever they may go; operating as compensation for the privilege of producing, manufacturing or bringing them within the state; and the sum which each individual may pay of this latter species of taxes, may not be in proportion to his property; but will be only in proportion to the quantity of such particular article so taxed, as may be consumed by him, or used by him in the way of his business and employment.

The term *excise* is of very general signification, meaning tribute, custom, tax, tollage or assessment. It is limited, in our constitution, as to its operation, to produce, goods, wares, merchandise and commodities. This last word will perhaps embrace everything, which may be a subject of taxation, and has been applied by our legislature, from the earliest practice under the constitution, to the privilege of using particular branches of business or employment, as the business of an auctioneer, of an attorney, of a tavern keeper, of a retailer of spirituous liquors, &c. It must have been under this general term commodity, which signifies convenience, privilege, profit and gains, as well as goods and wares, which are only its vulgar signification, that the legislature assumed the right which has been uniformly and without complaint exercised for thirty years, of exacting a sum of money from attorneys, and barristers at law, vendue masters, tavern keepers and retailers. For every man has a natural right to exercise either of these employments free of tribute, as much as a husbandman or mechanick has to use his particular calling. The money required of them is not a proportional tax; nor is it an excise or duty upon produce, goods, wares or merchandise. It is a commodity, convenience or privilege, which the legislature has, by cotemporaneous construction of the constitution, assumed a right to sell at a reasonable price; and by parity of reason it may impose the same conditions upon every other employment or handicraft.

. . . .

According to the construction of the constitution, there can be no doubt that the legislature might as well exact a fee or tribute from brokers, factors or commission merchants, for the privilege of transacting their business, as from auctioneers, or innholders, or retailers, or attornies. It will undoubtedly be the policy of a wise legislature not to multiply burthens of this sort; but we speak only of their power, presuming that it will never be exercised but for wise or necessary purposes.

If it should be true that this right exists with respect to individuals, then the only remaining question is, whether when a number of individuals have associated for the purpose of carrying on the business of brokerage, money lending or factorage more conveniently, extensively and securely, and for that purpose have obtained a license or charter from the government, they are exempt from a liability, which would attach to them severally as individuals. Did the legislature, when it incorporated the plaintiffs, relinquish the right of laying an excise or duty upon the business which they should transact during the continuance of the charter of incorporation? There is no express waiver or relinquishment, nor is there any strong implication of one. The object of their charter is to enable them in a body, to conduct their business as an individual, to make contracts and to enforce them as such, avoiding the inconveniences of a copartnership. This is all that is asked for by the company, and all that is given by the charter. It is a privilege to manage their business, and not an exemption from duty.

Suppose that heretofore the legislature should have enacted, that no person should keep a publick house, or retail spirituous liquors, without a license from some authority by them designated; but without exacting any tax or duty therefor: could it be contended that afterwards they were precluded from establishing a tax or excise upon the business thus permitted to be exercised?

Every man has the implied permission of the government to carry on any lawful business; and there is no difference in the right, between those which require a license and those which do not, except in the prohibition, either express or implied, where a license is required. So that to lay a duty or excise upon branches of business, which exist by license, is no infringement of any privilege conveyed by such license.

. . . .

Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons, who exercise the employment which is so taxed. A tax upon one particular moneied capital would unquestion-

ably be contrary to the principles of justice, and could not be supported; but a tax upon all banks we think justifiable upon the grounds we have stated.

Plaintiffs nonsuit.

STATE V. SCHLIER.

Supreme Court of Tennessee, October, 1871.
3 Heiskell 281.

NICHOLSON, C. J., delivered the opinion of the Court.

Defendant was presented at the September Term, 1870, of the Knox County Criminal Court, for having a gallery for taking photographs, ambrotypes, and other likenesses, without paying the privilege tax and taking out a license, contrary to the Act of February 24th, 1870, ch. 71, sec. 1. The Circuit Judge sustained a demurrer to the indictment, upon the ground that the Act of the Assembly imposing the tax was unconstitutional, and quashed the same. From this judgment the State has appealed.

The Constitution of 1834 contained the same language, as to the taxation of "privileges," that is found in the Constitution of 1870. It is as follows: "But the Legislature shall have power to tax merchants, pedlars, and privileges, in such manner as they may from time to time, direct." This language had been judicially interpreted in several cases, prior to the adoption of the Constitution of 1870. In the case of the *Mayor and Alderman of Columbia* v. *Guest,* the Court said: "We have defined it in several cases, to be the exercise of an occupation, or business, which requires a license from some proper authority, designated by a general law, and not open to all, or any one, without such license": 4 Sneed, 193; 5 Sneed, 258.

Such was the fixed judicial interpretation of the word "privileges," when the Convention of 1870 adopted exactly the same language, in forming the present Constitution. It was adopted with a full knowledge of the meaning which had been attached to it by the courts. This is conclusive as to the present interpretation to be placed on it.

The Act of February 24th, 1870, c. 24, sec. 1, is as follows:

"From and after the passage of this Act, artists taking photographs, ambrotypes, or any other likenesses, shall take out a license semi-annually, and pay a privilege tax therefor, as follows: For each and every gallery located in a city of over three thousand inhabitants, thirty-five dollars; for each and every gallery located in a

town of from five hundred to three thousand inhabitants, twenty dollars; for each and every gallery located in a town of less than five hundred inhabitants, or in the country, five dollars. Said tax to be paid to the Clerk of the County Court of the county in which the gallery may be located."

This act constituted the occupation or business of taking photographs, ambrotypes, and other likenesses, a privilege, according to the established definition of that term. Under the power "to tax privileges in such manner as the Legislature may from time to time, direct," this Act is constitutional, unless it is in conflict with Art. 11, Sec. 8, of the Constitution. This section is as follows:

"The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law."

By the plain and express language of Art. 2, Sec. 28, the Legislature has the power to exercise its discretion as to the mode of taxing privileges. If there is a conflict between this section and Sec. 8 of Art. 11, it is our duty so to construe them as to make both sections operative. But the first question is, does such conflict exist? It can not be maintained that the first clause of Sec. 8, Art. 11, is violated by the Act of February 24, 1870, c. 71, because this Act does not suspend any general law for the benefit of an individual, nor is it a law for the benefit of individuals, inconsistent with the general laws.

But it is insisted that the next clause in Sec. 8, Art. 11, is inconsistent with, and restrictive of Sec. 28, Art. 2, and, therefore, that the Act of February 24, 1870, c. 71, being in violation of the restrictive section, is unconstitutional. If the premise is correct, the conclusion is legitimate. Then the enquiry is Does the Act of February 24, 1870, c. 71, grant to any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may be, under that Act, extended to any other member of the community? The Act fixes a maximum tax on photographers of $35; and this is assessed on all who have galleries in cities of 3,000 inhabitants and over. There are no rights, privileges, immunities, or exemptions, granted to such artists, which may not be extended by this law to any other member of the community, who may choose to open a gallery for taking photographs, etc., in a city of 3,000 inhabitants or over. It is not easy to understand what kind of rights, privileges,

immunities, or exemptions, those are which are granted to an artist by taxing him $35 for exercising his art.

But the Act assesses a tax of $20 on those photographers who exercise their art in a town of not less than 500 inhabitants and not more than 3,000 inhabitants. Is this class legislation? This class of artists enjoy no rights, privileges, immunities, or exemptions, which any other artist can not enjoy under the same law. If the artist, in a city of 3,000 inhabitants or over, desires to enjoy the exemption or immunity from the tax of $35, under this Act, he can have the right and privilege of living in a town of less than 3,000 inhabitants and not more than 500, by moving his gallery there—the Act presents no obstacle to his doing so. So, in like manner, under the Act, the classes of artists who are required to pay $35, or $20, can be exempted from these taxes and have the benefit of a $5 tax, by taking their galleries into a 500 inhabitant town, or into the country. It can not be class legislation when every member of the community has the right to turn photographer, and exercise his art, either in a city, in a town, or in the country, as he may elect.

As to the policy of the graduation of the tax, according to the size of the city or town, we have nothing to say. This is a matter left to the discretion of the Legislature by Art. 2, Sec. 28; and we do not think that Art. 11, Sec. 8, contains any restriction on that discretion which has been violated by the Act of February 24, 1870, c. 71.

We, therefore, reverse the judgment of the Circuit Court, and remand the cause to be further proceeded in.

COLLECTOR V. BEGGS.

Supreme Court of the United States, December, 1872.
17 Wallace, 182.

Error to the Circuit Court for the Southern District of Ohio; the case being thus:

. . . .

Beggs, a distiller, made true and correct reports for the months of September, October and November, 1868, of all spirits by him *actually* produced. The amount of such spirits, so reported, exceeded 80 percentum of the producing capacity of the distillery of plaintiff for the said months respectively.

He also paid all the taxes assessable against him for such product so reported.

But by a survey of the distillery, which had been made in pursuance . . . . . of the act of July 20th, 1868, and in force during the said months of September, October, and November, 1868, the distillery was estimated to be capable of producing from each bushel of grain used three and one-quarter gallons of spirits.

The amount reported by Beggs as having been produced at his distillery during the said months was less than three and one-quarter gallons for each bushel of grain by him used during that time.

Hereupon the assessor, maintaining that Beggs was bound to pay taxes upon the amount of three and one-quarter gallons for each bushel of grain used by him during those months, assessed him upon the difference between the amount reported in his returns aforesaid and the said estimated product of three and one-quarter gallons per bushel as fixed and determined in the survey; and made return of this assessment to the collector.

On demand made by the collector, Beggs paid under protest the sum assessed, and having made application for repayment of it to the Commissioner of Internal Revenue, who refused to repay it, he brought suit in the court below against the collector, one Stevenson, to recover it.

The court found the facts above stated and held the assessment illegal, and the plaintiff entitled to recover.

Judgement being entered accordingly, the collector brought the case here.

Mr. Justice STRONG delivered the opinion of the court.

The twentieth section of the act of Congress in question prescribed a mode for the ascertainment of the quantity of spirits for which a distiller was required to account in his monthly returns to the assessor. By a previous section the distiller was required to make a return, but the twentieth section made it the duty of the assessor, on the receipt of the distiller's first return in each month, to inquire and determine whether he had accounted, in his return for the preceding month, for all the spirits produced by him, and, to determine the quantity of spirits thus to be accounted for, it required that the whole quantity of materials used for the production of spirits should be ascertained. It gave also a rule by which the quantity of materials used for the production of spirits should be ascertained and settled by the assessor, and it then enacted that in case the return of the distiller had been less than the quantity thus ascertained, he should be liable to be assessed for such deficiency, at the rate of fifty cents for every proof gallon, together with the special tax of $4 for every cask of forty proof gallons, which the collector was required to collect. It also en-

acted that in no case should the quantity of spirits returned by the distiller, together with the quantity so assessed, be less than 80 per centum of the producing capacity of the distillery, as estimated under the provisions of the act.

The next preceding section (the 19th) made it the duty of every distiller, on the 1st, 11th, and 21st days of each month, or within five days thereafter, to render to the assistant assessor an account in duplicate, taken from the books he was required to keep, stating not only the number of wine gallons and of proof gallons of spirits produced and placed in warehouse, but also the quantity and kind of materials used for the production of spirits each day.

The purpose of these requisitions, as well as of many others made by the statute, was obviously to guard against fraudulent returns, and to secure to the government a tax on all spirits produced, and upon all which might have been produced from the quantity of materials used. Hence the distiller was required to return, not merely the amount of his product, but the kind and quantity of materials used by him, and the assessor was directed to test the accuracy of that return, and to estimate, from the quantity of materials ascertained by him to have been used, the number of gallons of spirits which should have been accounted for. The quantity of materials used, as ascertained by the assessor, was made a measure of production, and upon all spirits ascertained *by that measure* to have been produced, either actually or potentially, the distiller was expressly required, by the twentieth section, to pay the tax, without any reference to his return, or to what had actually been produced. In no case could he escape from liability to pay a tax on at least 80 per centum of what his distillery was estimated to be capable of producing, but if he produced more, or if the quantity of materials which he had used, as ascertained and determined by the assessor, showed that his production had been or should have been greater, he was subjected to the required tax on the quantity of spirits which that ascertained quantity of materials was capable of producing, and not merely upon 80 per centum of that quantity. This was the unequivocal language of the act. Thus the quantity of materials used, *as ascertained by the assessor,* and not the actual product of spirits, was made the measure of liability to taxation and of its extent.

This construction of the 20th section is in entire harmony with all the other parts of the act. The 10th section directed a survey of every distillery registered, or intended to be registered, for the production of spirits, in order to estimate and determine its true producing capacity. This survey was required to be made by the assessor of the

collection district, with the aid of some competent and skilful person, to be designated by the Commissioner of Internal Revenue. The mode in which the producing capacity of the distillery was to be ascertained, as prescribed by the regulations of the commissioner, was by measuring each mash, or fermenting tub by calculating how many bushels of grain, when mashed (if grain was used), the fermenters would hold, by considering the period of fermentation, and deducing therefrom the number of bushels which could be fermented in twenty-four hours. This ascertained, the assessor and his assistant were directed to estimate the quantity of spirits that could be produced in the distillery from a bushel of grain, and multiplying that by the number of bushels that could be fermented therein in twenty-four hours, the producing capacity of the distillery was to be ascertained and fixed as a standard of taxation, or rather to determine the minimum of taxation. At all events the distiller was made taxable for a production of spirits not less than 80 per cent. of the producing capacity of his distillery, as determined by the survey, whether that quantity was actually produced by him or not; or whether he used a bushel of grain or not. Eighty per cent. of the estimated (not the actual) capacity of the distillery, was the smallest amount for which he was taxable. But if he actually produced more, or if the quantity of grain or other materials used for distillation, as ascertained by the assessor, showed a larger production, he was made taxable to the full extent of that production thus shown. No other interpretation can be given to the 20th section.

Now, applying this to the facts of this case, as found by the Circuit Court, it becomes very evident that the judgment should have been given for the defendant below.

It is true the actual production of spirits for the three months, September, October, and November, 1868, as returned by the plaintiff below, and correctly returned, was more than 80 per cent. of the producing capacity of his distillery for those three months. Whether it was more than 80 per cent. of the producing capacity, *as determined by the survey, provided for in the tenth section of the act,* is not found, nor is it material. It is found that by reason of the survey made in pursuance of that section, the distillery was estimated to be capable of producing from each bushel of grain used, three and one-quarter gallons of spirits; that the quantities reported by the plaintiff, as having been produced during those three months, were less than three and one-quarter gallons for each bushel of grain used by him during that time, and that the additional assessment was made, of which he complains, was for the difference between the quantity reported in his re-

turns and the estimated product of three and one-quarter gallons for each bushel of grain used, the possible production determined by the survey. Such being the facts, as found, the plaintiff was expressly declared by the 20th section to be assessable for the difference between his return and the estimated possible product, and it was made the duty of the collector to collect it. The survey and estimate of producing capacity made under the 10th section were conclusive, while they remained, though subject to revision, under the direction of the Commissioner of Internal Revenue. And the extent of liability to taxation was, under the act of Congress, directed to be measured, not by the actual product of spirits but by what should have been the product of the materials used, according to the estimate made under the 10th section.

It follows that the assessment made was legal, and that the plaintiff is not entitled to recover. The Circuit Court, therefore, erred in giving judgment for the plaintiff.

JUDGMENT REVERSED, and the record remitted with instructions to enter JUDGMENT FOR THE DEFENDANT.

III. LOCAL TAXATION.

CITY OF BURLINGTON V. PUTNAM INSURANCE CO.

Supreme Court of Iowa. December, 1870.
31 Iowa, 102.

This action is brought to recover certain license fees and assessments levied under the ordinances of the city of Burlington. A demurrer to the petition was sustained. Plaintiff appeals.

BECK, J. By an amendment to the charter of the city of Burlington the city council is empowered "to levy and collect taxes on all real and personal property in said city, not exempt by the general law from taxation;" and also "to grant or refuse licenses" to insurance companies, other than mutual companies, and "to require and receive for such licenses such sums of money as they may deem expedient and just." Acts, 4th Gen. Assem., ch. 49. By an ordinance of the city, it is provided that "there shall be levied and collected on every license granted for any business or object herein specified, as follows: that sum which the city council shall, by resolution of record, from time to time, declare." The business of insurance is specified in the ordi-

nance as subject to license. By a subsequent resolution of the city council it is declared that "insurance companies or agencies shall pay into the city treasury, quarterly, under oath, one per cent. on their premiums, and, in addition thereto, the following sums for licenses. Those companies or agencies whose premiums amount to less than $500 shall pay $5; those whose premiums amount to $500 and less than $1,000, $10; those whose premiums amount to $1,000 and less than $1,500, $15; those whose premiums amount to $1,500 and over, $15." Under this ordinance and resolution, defendant failing to pay the assessments therein authorized upon the receipt of premiums to the amount of $570, this action is brought to recover the same.

Defendant demurred to the petition on the grounds that the license and tax which the plaintiff seeks to recover is not authorized by the laws of the State, and the ordinance and resolution set out in the petition are not sufficient to authorize the license and tax. There is another objection set out in the demurrer, but as it is not presented in argument in this court by counsel it need not be noticed in this opinion.

It is necessary to consider the assessment of one per centum upon the amount of premiums received, and the amount imposed for a license, separately.

I. It cannot be fairly claimed that the one per centum is a charge for license. The resolution authorizing the collecting of that sum expressly distinguishes the two. It in terms requires the payment of the one per centum, and then declares that there shall be collected "in addition thereto the following sums for licenses," specifying the amounts to be paid. The one per centum is clearly not required to be paid for or on account of the license. It is, then, an assessment in the nature of a tax. Is the city authorized to levy it? It may levy and collect taxes upon the real and personal property in the city, and this is the extent of its taxing power. It is a well settled rule that taxes can be levied and collected by municipal corporations only, as the power is conferred upon them by the legislature; from that source they derive authority to levy taxes, and it must be exercised in the manner prescribed in their charters. The power conferred in this instance is to levy and collect taxes upon real and personal property. It is not pretended that the one per centum is levied on account of real estate owned by the defendant, but it is an assessment upon an income from premiums. This income cannot be considered as personal property, and is, therefore, not liable to taxation as such. This point was ruled in *The City of Dubuque* v. *The Northwestern Mutual Life Ins. Co.*, 29 Ia. 9.

The one per centum assessment is, in our opinion, unauthorized by the charter of the city.

II. The charge imposed for licenses will now be considered. The city is authorized to grant licenses and charge therefor such sums as it may deem expedient and just. It is argued by defendant's counsel that the charter, or rather the amendment thereto, so far as it bestows the power of imposing licenses upon insurance companies, is repealed by section 38 of chapter 138, acts twelfth general assembly, regulating the taxation to be imposed upon them; but the amended charter of the city, giving the licensing power, is, we conclude, not repealed by the act named, for the following reasons: The two acts do not relate to the same subject. The provision of the charter relates to the licensing of the insurance companies, and grants the power as a part of the police authority of the city. The section of the act cited, as repealing this provision, relates to the taxation of insurance companies. These acts, therefore, cannot be in conflict, and by no rule of construction can the last act be held to repeal, by implication, the authority conferred in the charter to license insurance companies. But it is said that the license issued by the city is for the purpose of revenue and is, therefore, a tax. We will not determine the question whether, if it, in fact, amounts to a tax under the charter, the authority to levy it is taken away by the act providing for the taxation of insurance companies above referred to. We will dispose of the point raised upon a different view, and will not touch the question of repeal thus raised.

We may concede that a power to license will not authorize, under the guise of licenses, taxation for revenue; that licenses are a part of the police regulations of a city, and should be charged for as such, and only to such extent as may reasonably compensate the city for issuing and enforcing the license, and for the care exercised by the city, under its police authority, over the particular person licensed. But who shall determine what sum is within these bounds? The charter of the city leaves this question with the city council, who are authorized to charge such sums "as they may deem expedient and just." The legislature evidently intended they should determine the proper sum to be charged for licenses. We must not be understood as holding that a court cannot, in any case, interfere if the sum should be clearly unjust or oppressive, or levied for the purpose of raising revenue. But in the case before us no such showing is made. We cannot say that the charges fixed by the council are not such as are necessary and proper compensation for the expense and enforcement of the license and the protection of defendant under police regulations

connected with or growing out of the license. *The State, for the use, etc.,* v. *Herod,* 29 Iowa, 123.

It is urged that the charge for licenses are not the same upon all companies, but is varied to correspond with the income of the parties taking licenses. This is not a good objection. The right and power vested in the city to fix the charge would authorize them to vary it with different parties, as they may deem prudent and just. The difference in the charges appears to me to be based upon just grounds. The city is authorized to license vehicles. It would be just that those of different capacities should be charged different sums. The same reasons that would justify such course of dealings with vehicles supports the difference in charges for licenses to insurance companies.

. . . .

The demurrer, so far as it was directed at the right of plaintiff to recover the one per centum upon the premiums of defendant, was rightly sustained, but the decision thereon against the power of the city to license and collect charges therefor, as provided in the ordinance and resolution of the city council, is erroneous. The judgment of the district court is therefore reversed and the cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

MAYOR ETC. OF NEW YORK V. SECOND AVE. R. R. CO.

Court of Appeals of New York, March, 1865.
32 New York, 261.

This action was brought to recover the penalty of fifty dollars, imposed by an ordinance passed by the plaintiffs December 31, 1858, upon the proprietor of every passenger railroad car running in the city of New York below 125th street, who should not procure a license from the mayor for each car, and pay annually therefor the fee of fifty dollars.

All the facts alleged in the complaint are admitted by the answer; but the defendants set up as a defense an agreement made between the plaintiffs and the defendants' assignors, dated December 15, 1852, whereby permission was granted to such assignors to construct and operate a railroad in Second avenue, and which, they contend, estops the plaintiffs from requiring any license.

To this answer there was a demurrer, which was overruled at Spe-

cial Term, and the judgment affirmed at General Term, INGRAHAM, J., dissenting.

From that judgment the plaintiffs appeal to this court.

The only question presented is that of the validity of the ordinance of December 31, 1858.

. . . .

BROWN, J.

. . . .

The plaintiffs must show, however, that the subject of the ordinance which they are seeking to enforce, is one over which they have authority to legislate, and that it is a regulation of police and internal government, and not the mere imposition of a duty or sum of money for the purposes of revenue. The agreement betwen the plaintiffs and Pearsall and his associates, of the 15th December, 1852, has all the properties of a contract.

. . . .

This right of regulation and control the plaintiff specially reserved in the instrument creating the grant, in addition to their general powers to make ordinances and regulations of police for the government of the city. This brings me to consider the nature and character of the ordinance for the breach of which this action is brought.

Section 106 declares that "each and every passenger railroad car running in the city of New York below 125th street, shall pay into the city treasury the sum of fifty dollars annually for a license, a certificate of such payment to be procured from the mayor, except the small one horse passenger cars, which shall each pay the sum of twenty-five dollars annually for such license as aforesaid." Section 2 declares that "each certificate of payment of license shall be affixed to some conspicuous place in the car, that it may be inspected by the proper officer." And section 3 prescribes the penalty for running a car without the proper certificate. That is all. There is nothing for the railroad corporations to do but to pay to the mayor the sum of fifty dollars annually for each car, and receive in return a license or certificate that the money has been paid. The ordinance imposes no duties to be observed by the company or its servants, but the single act of paying the money. It prescribes no regulations in regard to the size, dimensions, comfort and cleanliness of the cars, the speed at which the same shall be run, the manner of receiving and discharging passengers, their numbers and names, and the stations at which they shall stop. Regulations of police are regulations of internal or domestic government, forbidding some things and enjoining the performance of others for the security and protection, and to promote the happi-

ness of the governed. The only act enjoined by the ordinance in question is the payment of the fifty dollars, and the only act which it forbids and prohibits is the running of the cars without the payment of the money. If the legislature should by law require every head of a family throughout the State to pay to the collector the sum of twenty dollars, and take his receipt therefor, it would be a fiscal measure, an expedient to replenish the treasury, not a regulation of police prescribing a rule of action and conduct. So with this ordinance, call what it requires by the name of license or certificate of payment or anything else, its primary, and indeed, only purpose is to take from the company, under coercion of the penalty which it imposes, the sum of fifty dollars annually for each car run upon the road for the benefit of the city. The certificate which the company is to receive upon payment being made, is called a license in the ordinance. A license to do what the ordinance does not say—and indeed it could not, with truth, say—a license or permission to employ the car in the transportation of passengers upon the road, for the absolute right to do that which had been not only acquired, but positively enjoined upon the company by the stipulations of the grant of the 15th of December, 1852. It is vain, therefore, to speak of it or treat it as a license, or a regulation of police. It is the imposition of an annual tax upon the company in derogation of its rights of property, and on that account is unlawful and void.

The judgment of the supreme court should be affirmed, with costs. Judgment affirmed.

The reverse is true, i. e., the power to tax does not give power to license. Burlington v. Baumgardner, 42 Iowa 673. Further, power to regulate does not give power to license, *ibid*, or to charge a fee. Dunham v. Rochester, 5 Cowen 462; Kip v. Patterson, 26 N. J. L. 298. So also the licensing of an occupation does not exempt it from the tax power. Ould v. Richmond, 23 Grattan 464, *infra*. The distinction between the taxing power and the police power, where it is combined with the power to license, does not however preclude the imposition of a fee where only the police power of licensing is possessed. Thus in all cases a fee sufficient to pay the expense of issuing the license may be demanded. Van Hook v. City of Selma, 70 Ala. 361. But in case of trades whose influence like that of the liquor trade is believed to be harmful, a fee large enough in amount to discourage the trade may be demanded merely where the licensing power is possessed. Tenney v. Lenz, 16 Wis. 566. See also City of Chester v. W. U. Tel. Co., 154 Pa. St. 464; W. U. Tel. Co. v. Borough of New Hope, 187 U. S. 419, *supra*.

CITY OF NEWTON V. ATCHINSON.

Supreme Court of Kansas. July, 1883.
31 Kansas, 151.

Action by T. B. Atchinson and another, (partners as Atchinson & Knowlton,) and others, against the *City of Newton* and three others, to perpetually enjoin said city and its officers from enforcing against plaintiffs, as hardware and implement merchants therein, a certain ordinance levying a business license tax against them. March 6, 1883, Hon. L. Houk, judge of the district court, at chambers, overruled defendants' motion to dissolve a temporary order of injunction theretofore granted in favor of plaintiffs. This ruling the defendants bring to this court. The facts are sufficiently stated in the opinion.

The opinion of the court was delivered by

Brewer, J.: The question in this case is as to the validity of a certain ordinance of the City of Newton, providing for the levy and collection of a license tax.

. . . .

. . . . The plaintiffs in the present case, defendants in error here, were all hardware merchants. . . . . . They challenge the validity of this ordinance so far as it imposes upon their business, that of hardware merchants, a license tax. . . . . . The first section of the ordinance contains all the facts necessary to a full understanding of the questions involved. That section reads: "That a license tax per annum is hereby levied upon all merchants or persons engaged in merchandising, as follows, to wit: Five dollars upon all persons whose average amount of stock does not exceed one thousand, and two dollars and fifty cents in addition thereto for every one thousand dollars or fractional part thereof in excess of the first thousand dollars."

Before noticing some specific objections which are made to this particular tax, we think it proper to state certain general propositions which underlie this matter of a license tax.

First. In the absence of any inhibition, express or implied, in the constitution, the legislature has power, either directly to levy and collect license taxes on any business or occupation, or to delegate like authority to a municipal corporation. This seems to be the concurrent voice of all the authorities.

. . . .

Second. There is no inhibition, express or implied, in our consti-

tution, on the power of the legislature to levy and collect license taxes, or to delegate like power to municipal corporations. It is not pretended that there is any express inhibition. It has been contended that § 1, art. 11, creates an implied inhibition, and this because it reads that "the legislature shall provide for a uniform and equal rate of assessment and taxation." But that section obviously refers to property, and not to, license taxes. . . . . .

In Burroughs on Taxation, § 54, referring to the various provisions in the different constitutions as to uniformity and equality, the author adds:

"These provisions, as a general rule, are held to apply to property alone, and not to include taxation on privileges or occupations."

Sedgwick, in commenting upon this subject, says:

"In construing these provisions, it has been held, in many of the states, that the words 'equal' and 'uniform' apply only to a direct tax on property, and that the clause in regard to uniformity of taxation does not limit the power of the legislature as to the object of taxation, but was only intended to prevent an arbitrary taxation, according to the kind or quality, without regard to value. Specific taxes have therefore been sustained as a valid exercise of the legislative power." (See Sedg. on Stat. and Const. Law, 2d ed., 504-507.)

. . . .

Passing now to some specific questions raised as to this particular tax, we remark—

Third. That § 3 of chapter 40, Laws of 1881, gives express authority to levy and collect license taxes on certain occupations. . . . . . The language of the section seems plain. It reads, "The city council shall have exclusive authority to levy and collect a license tax on auctioneers," etc. We cannot see how language can be plainer. Every part of the sentence points toward this power. The verbs used are "levy and collect," words generally used in reference to taxes, and not very apt in respect to mere licenses. The city is authorized to levy and collect a license tax. The principal word here is "tax," and the term "license" simply qualifies and describes it. Where nothing but license is contemplated, the language ordinarily is direct, and grants power "to license," or "to license and regulate," or "to adopt rules and regulations for licensing."

. . . .

Fourth. The validity of the tax is challenged on the ground that in the charter there has been no compliance with §5, art. 12 of the state constitution, which reads:

"Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power."

It is said that the charter contains no restrictions with regard to these license taxes. If it were true that there was absolutely no restriction, it might well be held that the power was not granted; and yet there are very respectable authorities, and indeed the weight of authority seems to be to the effect, that it is purely a matter of legislative discretion. In 1 Dillon on Municipal Corporations, 3d. ed. § 50, the author, after quoting from the constitution of New York a section similar to the one in our constitution, observes:

"This obviously enjoins upon the legislature the duty of providing suitable and proper restrictions upon the enumerated powers; but in what these restrictions shall consist, and how they shall be imposed. are subjects left to the discretion or sense of duty of the legislative department, with the exercise of which the courts cannot interfere."

In *Hill* v. *Higdon,* 5 Ohio St. 248, the court, by Ranney J., says that a failure of the legislature to observe these constitutional requirements "may be of a very serious import, but lay no foundation for judicial correction." In Cooley on Taxation, page 252, we find the law thus stated:

"By some state constitutions it is expressly made the duty of the legislature, in conferring local power of taxation, to impose restrictions on the power in order to prevent its abuse. Such a provision is addressed to the discretion of the legislature, which will impose such and such only as are deemed advisable."

See also the authorities cited in the note, as well as those in the note to the quotation from Dillon, *supra.*

But this constitutional provision has been before this court, and has here received a judicial construction. (*Hines* v. *City of Leavenworth,* 3 Kas. 203.) In that case, while the necessity of some restriction was insisted upon, it was held that full discretion as to what restrictions should be imposed was left to the legislature; and that the court would not interfere even though of the opinion that the restrictions were not sufficient to prevent abuses. In that case two or three restrictions of a very trivial nature were adjudged sufficient. Here it is provided that no tax shall be levied except by ordinance, and such ordinance must receive a majority of all the votes of the councilmen elected, and that the vote must be taken by yeas and nays, and entered upon the record of the proceedings of the council. It is true there is no restriction upon the amount of tax which may

be levied; no more was there in the case in 3 Kas., *supra.* Instead of being a direct, in that case as well as this, there is only, so to speak, an indirect restriction, and yet if the legislature deems this indirect restriction sufficient, it is not for the courts to ignore it and say it amounts to nothing. . . . . . . Therefore this objection to the validity of this tax also fails.

Fifth. It is finally objected that this tax is in effect a property tax, and therefore void. This is based upon the language of the section heretofore quoted. The tax upon merchants is graduated by the average amount of stock. If that average does not exceed $1,000, the tax is $5 per annum, and for each $1,000 or fractional part thereof in excess, $2.50. Therefore, being graduated by the amount of property, it is in substance and effect only a property tax. This is the difficult question in the case. The argument is, that the law regards substance rather than form; that you may not do indirectly what you cannot do directly; that it would be clearly invalid to levy a tax on a merchant's property of five mills—that being the levy on all other taxable property—and then impose a second tax of five mills on his property alone. If this cannot be done by a direct tax on his property, it cannot be done indirectly by calling the second tax one on business. The language of the ordinance is similar to that in the general tax law, and the tax is in each case graduated by the average amount of stock. While the right to graduate a business tax may be conceded, yet the graduation must be by some standard which is a fair criterion of the amount of business. The amount of stock is not such a criterion, for though one man's stock may be large, his sales may be few and his business limited; while another whose stock averages much less may do a much larger business, selling and replacing with greater rapidity. The amount of stock may be a test of property, but not of business.

In support of these views, counsel cite the following authorities: *Livingston* v. *City of Albany,* 41 Ga. 21; *Commonwealth* v. *Stodder,* 2 Cush. 572; *Durham* v. *Trustees,* 5 Cow. 466; *Mayor* v. *Rld. Co.,* 32 N. Y. 373; *State* v. *Rld. Co.,* 40 Md. 22; *State* v. *Rld. Co.,* 4 S. C. 376; *Orleans* v. *Pierre Nongues,* 11 La. An. 740; Burroughs on Taxation, 69 and 70; *Bank-Tax Case,* 2 Wall. 200; Cooley on Taxation, page 164.

But notwithstanding the plausibility of this argument, we are constrained to think it not sound. The tax provided by this ordinance is in terms a tax upon business. The results of a tax do not determine its character. Every license tax compels the party to pay more taxes than his taxable property justifies. A merchant and a

farmer have each $5,000. The property tax on each is the same. Any license tax imposed on the former increases his total taxes above the amount properly chargeable on $5,000. Yet this does not make the license tax a tax on property. Indirectly one's property may be affected. It will be diminished by so much as is necessary to pay the license tax. The argument of counsel carried to its final results makes against the validity of all license taxes.

Again, graduation in the matter of license taxes is not ouly supported by the authorities, but is also eminently just. A license tax which is the same on a merchant doing an annual business of $5,000 as upon one doing a like business of $1,000,000, strikes anyone as unjust, and as distributing the public burdens very unfairly. It may be said that the property tax, being proportioned to the amount of property, equalizes burdens, and that both, engaged in the same business, should pay the same business tax. But the principles that justify the graduation in property, apply in business taxes. The larger the business, the greater the protection and benefit of organized society and government. And if graduation is permissible, then any standard or rule of graduation may be adopted which is reasonably fair and just. And the fact that the same standard is adopted which is used in other taxation does not change the character of the tax. Because a license tax is proportioned in the same manner as a property tax, it does not therefore cease to be a license tax. And that is really the point of counsel's argument. This license tax is graduated as property taxes are graduated. Therefore it is a property tax. The reverse argument would be just as logical, and demonstrate as forcibly, that all property taxes are simply license taxes. The rule of graduation adopted in this case may not be absolutely perfect. The amount of stock does not necessarily determine the amount of business. And yet it is ordinarily a fair criterion. And some objection can be made to any standard suggested. If the amount of sales is named it can be objected that in some cases profits are large and in others small, so that one with the larger income may pay the smaller business tax. If profits are named, then, as out of a single transaction or two large profits may sometimes be made, one who really does very little business may be charged with a large business tax. Besides, profits are so largely a matter of the merchant's personal knowledge and of his alone, that it would be difficult to practically enforce such a standard with any degree of accuracy. It is hard enough to enforce one based upon the average amount of stock, and yet that is a visible fact. No standard will in all cases be found absolutely perfect and securing equal and exact justice. And while we

think the amount of sales would be a fairer standard, yet the amount of stock cannot be pronounced entirely arbitrary and with no reasonable relation to the fact to be determined. It cannot be adjudged that a license tax graduated thereby is by reason thereof invalid.

. . . .

From Cooley on Taxation, 164, counsel quote the following:

"There is a sense, however, in which duplicate taxation may be understood—and which, we think, is the proper sense—which would render it wholly inadmissible under any constitution requiring equality and uniformity in taxation. By duplicate taxation, in this sense, is understood the requirement that any person or any subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once. We do not see, for instance, how a tax on a merchant's stock, by value, could be supported, when, by the same authority and for the same purpose, the same stock was taxed by value as a part of his property. This is a very different thing from one tax upon property and another upon the business, though the latter may indirectly reach the property; here is no circumlocution, no question of the ultimate effects, but a tax levied twice on the same subject, only under a different name.

We do not understand this as meaning what they claim, but as simply holding that there cannot be two direct taxes upon the same property, it being listed and described under different names. We think that the latter part of the quotation makes the author's meaning clear. See also the note to page 139, in which he says:

"A law which should make no discrimination in the taxation of business, we should say in some cases would produce the grossest injustice and inequality, and it may be seriously questioned whether the requirement of uniformity in the taxation of business could be understood as forbidding the classification of those engaged in the business; for example, underwriters, by the business done or premiums received; merchants, by the capital invested or the sales made, etc., and the apportionment of taxes accordingly."

See also, on pages 384 and 385, he says:

"The methods in which business should be taxed are also in the legislative discretion. The taxes which are most customary are: (1) On the privilege of carrying on the business; (2) on the amount of business done; (3) on the gross profits of the business; (4) on the net profits, or profits divided. But the tax may be measured by other standards prescribed for the purpose, as well as by them."

In *Simmons* v. *The State,* 12 Mo. 268, the court held that a license

tax on lawyers might be graduated. (See also *City of Burlington* v. *Insurance Co.*, 31 Iowa 102; *Mares* v. *Erwin,* 8 Hump. 290; *Osborne* v. *Mayor, &c.,* 44 Ala. 498; *Ex. Co.* v. *Mayor, &c.,* 49 Ala. 404; *Ould* v. *City of Richmond,* 23 Gratt. 464; *Commonwealth* v. *Moore,* 25 Gratt. 951; *Sacramento* v. *Crocker,* 16 Cal. 119.) This last was a case where the license was graduated by the amount of monthly sales, and the tax was sustained.

We have prolonged this opinion as far as is necessary. Our conclusion is that the tax cannot be held unconstitutional and invalid. Therefore the courts may not interfere to restrain its collection. If unwise or impolitic, the people can soon put a stop to it and correct any mistake which their officers may make in this respect.

The judgment of the district court will be reversed, and the case remanded with instructions to sustain the motion to dissolve and vacate the order of injunction.

HORTON, C. J., concurring.

OULD & CARRINGTON V. CITY OF RICHMOND.

Supreme Court of Appeals of Virginia. June, 1873.
23 Grattan 464.

This was an action of assumpsit in the Circuit Court of the City of Richmond, instituted in November, 1871, by Ould & Carrington, lawyers, against the City of Richmond. The object of the suit was to establish the constitutionality of the ordinance of the city council, imposing a tax on lawyers. Issue was made up on the plea of "*non assumpsit,*" and the whole matter of law and fact was submitted to the decision of the court.

. . . .

By the ordinance imposing taxes, persons following various employments in the city were classified, and a specified tax was imposed on each class. Among these were lawyers who were divided into six classes.

. . . .

In 1871 the committee of finance placed the plaintiffs, as lawyers, in the first class, and classified all lawyers practising in the city in the respective classes mentioned in s. 5 of the ordinance; that being the section in reference to lawyers. In doing so the committee had no

assessment of the plaintiffs' income from their profession before them; nor did the committee ascertain, or attempt to ascertain, their incomes in any way; but formed its own estimate, without evidence, of the reputation and standing of the lawyers practising law in the city of Richmond, including the plaintiffs, and their supposed capacity to make profits in that way, relatively with each other, and classified them accordingly. The committee made no report to the council of their action in the premises; nor did the council ever revise or consider it in any way; but an opportunity was offered to all the lawyers to show, each for himself, that they had been taxed too high in the manner provided in the eleventh section of the ordinance; and some of them availed themselves of that opportunity; and among them the plaintiffs, whose tax was reduced from one hundred and fifty to one hundred dollars; but in doing so the committee acted without evidence of the relative incomes of the lawyers embraced in the classification. The plaintiffs having paid the tax under protest, after the officer had levied upon their property, brought this action to recover it back.

Upon the hearing of the case there was a judgment for the plaintiffs; and the city of Richmond having taken an exception to the opinion and judgment of the court, applied to this court for a *supersedeas*; which was awarded.

ANDERSON, J.—The power to tax rests upon necessity, and is inherent in every sovereignty. It is included in the general grant of legislative power; and reaches, as is said by Mr. Justice Cooley, "to every trade or occupation; to every object of industry, use or enjoyment; to every species of possession." "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent in the State or Corporation which imposes it, which the will of such State or Corporation may prescribe." Cooley on Constitutional Limitations, ch. 14. p. 479-482. And in the language of Chief J. Marshall, the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised upon the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against its abuse is the structure of the government itself. The influence of the constituents over their representative is the safeguard against its abuse. *McCullough* v. *Maryland,* 4 Wheat. R. 316-428. It must always be conceded that the proper authority to determine what should, and what should not properly bear the public burden, is the legislative department of the State. This is true not only of the State at large, but it

is true also in respect to each municipality, or political division of the State. But these municipal corporations have only such powers as the Legislature of the State confers on them. Cooley 488. And their powers are controlled by the constitution of the United States, and of the State. The restrictions which they impose on the legislative power of the State rest equally upon all the instruments of the government created by it. Ib. p. 198.

The powers of public corporations are either express, implied, or incidental. And except as to such powers as are incidental the charter itself, or the general law under which they exist, is the measure of the authority to be exercised. They have no inherent jurisdiction, like the State, to make laws, or adopt regulations of government. They are governments of enumerated powers, acting by a delegated authority; so that while the State Legislature may exercise such powers of government, within the description of legislative power, as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and such as are incidental, subject to such regulations and restrictions as are annexed to the grant. Cooley 192.

With these general principles in view, we will now enquire, whether the charter of the City of Richmond invests the municipality with power to impose the tax complained of. And then if such power is conferred, has it been properly exercised in this case? By section 69 of the charter, sep. acts of 1869-70 p. 138, it is provided that, "For the execution of its powers and duties the city council may raise annually, by taxes and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of this State and of the United States." This clause confers the general power of taxation, except only as it may be limited by the laws of the State and the United States; and includes all powers and subjects of taxation. And as to the manner of laying the tax, the council is invested with full discretion. And they are authorized to lay a tax to defray the expenses of the city to an amount which they may deem necessary. It seems to me that this language is broad enough to embrace, not only a tax on real and personal property, but every other description of tax which the council might deem necessary and proper, unless its meaning is limited and circumscribed by what follows.

. . . .

Whilst a lawyer's license authorizes him to practice law in any court of the commonwealth, and it is not within the power of any

municipality to deprive him of that right, or to take away his license, it is a civil right and privilege, to which are attached valuable immunities, and pecuniary advantages, and is a fair subject of taxation by the State, or by a municipal corporation where he resides and enjoys the privilege. It is a vested civil right; yet it is as properly a legitimate subject of taxation as property to which a man has a vested right. I cannot perceive that there would not be as much reason for saying that a man's property is not taxable because he has a vested right to it, as for saying that a lawyer's license is not taxable, because he has a vested right to it.

I am of opinion, therefore, that the power to tax a lawyer's license is included in the general power of taxation given by the first clause of sec. 69; and that it is not taken away by anything that follows.

. . . .

It only remains to enquire, has it been constitutionally exercised in this case?

By an ordinance of the council, the lawyers of Richmond were divided into six classes; and the individuals of each class were assessed with a certain amount of taxes; and a committee was appointed, charged with the duty of assigning them to the class to which they respectively belonged. It is contended that the council could not delegate this power to a committee.

That the power of taxation is an important and delicate trust confided to the council, and cannot be delegated by them to a committee of their own body, or to any other agency, is unquestionably true. It is a legislative power; and when granted to a municipality it can only be executed by itself, or by such agencies or officers as the statute has pointed out. So far as its functions are legislative, it rests in the discretion and judgment of the municipal body entrusted with it; and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates, or of any other authority. Cooley, p. 204, 205, and cases cited.

But was the assignment of the lawyers to their respective classes a legislative function? The enactment that the lawyers should be divided into six classes, and that a tax of so much should be levied upon each individual of a class, was legislative, and was performed by the council itself. Was the inquiry as to which class the lawyers should be respectively assigned, and the assignment of them to their respective classes, a legislative or ministerial act? If it is a legislative function, the commissioners of the revenue, under a delegated authority from the general assembly, have been performing yearly, without question, legislative functions. It is a service which could

not be well performed by the legislative body. It is the function of a commissioner, in order to the execution of a legislative act, and is ministerial; and it seems to me that it was competent for the council to require the service to be performed by a committee of their own body, as well as by a commissioner, or the general assessor. And it was not more necessary that the action of said committee should be reported to the council, and have its confirmation, than that similar duties by a commissioner of the revenue should be reported to and confirmed by the Legislature of the State. But the taxpayer should be provided with ample remedies for redress, if he has been aggrieved by the action of the committee. Whether the remedy provided in this case by the ordinance of the council is adequate or not, there is no complaint by the appellees that any injustice has been shown to them; and it is a question, it seems to me, for the council and their constituents, and does not come within the province of the courts.

It is objected, also, that the mode of ascertaining the class to which the lawyers should be respectively assigned, was uncertain and wholly inadequate to the attainment of justice, and vitiates the whole proceeding. If it be an income tax, as it is contended it was designed to be, an assessment was necessary to ascertain what was the income of the lawyer to be taxed. And if it was not an income tax, but a license tax, that is a tax on the civil right or privilege conferred by the license, the tax ought to be proportioned, as nearly as practicable, to the value of that right and privilege. But, exact justice and equality are not attainable, and consequently not required. Cooley on Con. Lim.; *Slaughter's Case,* 13 Gratt. 767; *Eyre* v. *Jacob, sheriff,* 14 Gratt. 422, 434, 435; *Gilkeson* v. *Frederick Justices,* 13 Gratt. 577.

I do not think it was intended to be a tax on income. The classification of lawyers shows this. It was intended to be a tax on the civil right and privilege. And it is true that the tax ought to be proportioned, as nearly as practicable, as I have said, to the value of the privilege. Justice and equality, which are of the essence of constitutional taxation, require it. The act of the council requiring the assignment of the lawyers into six classes, and the gradation of the tax upon them, according to the class to which they were respectively assigned, shows an intended approximation to equality; and if the assignment is fair and judicious, as nearly attains it as is perhaps practicable in a license tax. It is true that the principle upon which this classification is made by the 5th section of the ordinance, which is in relation to the classification of lawyers, doctors, &c., is not in

terms expressed. The 3d section in relation to commission merchants, brokers, &c.; the 4th section in relation to "sellers by wholesale or retail of wine or spirituous liquors;" the 7th section in relation to "agents or sub-agents of any insurance company or office, whose principal office shall be located out of the city;" and the 8th section in relation to "express companies and telegraph companies, having a place of business in the city," all adopt the method of classification, as in the 5th section; nor in either is the principle expressly stated upon which the classification shall be made. If the tax upon lawyers is unconstitutional and void, upon this ground, it is in all the other cases; which would be disastrous to the financial condition of the city; and a question involving consequences of such moment ought to be well considered by this court, before it declares those ordinances unconstitutional and void, on this ground.

The 11th section provides, "that the committee of finance shall place each person and firm, employed in the trade or business referred to in sections 3, 4, 5, 7, and 8, in the class to which the committee shall be of opinion such person or firm properly belongs, looking to all the circumstances of the case." Now while it is not expressed that the classification shall be made with reference to the value of the civil right or privilege conferred by the license, that, it seems to me is the obvious design and object of the classification, and would be so understood. For what other object could a classification have been made, than to attain justice and equality as near as practicable by levying a tax proportionate to the value of the privilege to the party taxed; and it is to this end that the committee is instructed "to look to all the circumstances of each case." It might have been better to have expressed the object and design of the classification as a guide to the committee; but it seems to me that it is manifest without being expressed. And the charter expressly invests the council with full discretion to raise the necessary revenue, by taxes and assessments, "in such manner as they shall deem expedient, in accordance with the laws of this State and of the United States;" I am not aware that these provisions of the ordinance are in conflict with any law of the State or of the United States. That the discretion reposed in the committee may be abused is possible; but not more likely, I think, than that the same power might be abused by a commissioner of the revenue. The council having by their act of legislation, required the lawyers to be placed in six different classes, and declared what tax should be paid by the individuals composing each class, directed one of its most important standing committees, the committee of finance, to assign them respectively to such class as

they should properly belong. It is fair to presume, that this committee is composed of intelligent, discreet, and trust-worthy gentlemen, residing in different parts of the city, who would be informed as to the relative standing of the lawyers in the city, and the extent of their business, from their own observation, and from reputation and would not be likely to err greatly in their determination as to which class they should be respectively assigned. I should suppose that there is not an intelligent business man in the city of Richmond, such a one as should be selected as a councilman, and placed on the committee of finance, who, if not sufficiently informed as to the relative practice of every lawyer in the city, could not get sufficient reliable information by inquiry, to enable him to determine, with reasonable accuracy, to which of the six classes he should be assigned, especially after a free interchange of views with the other members of the committee.

It is true, that they might be mistaken in individual instances, which I should think, however, would rarely be the case. But, as such mistakes might occur, a remedy was provided for correcting them, which was applied in this case. Now, whether this was the best mode for attaining justice in the classification of the lawyers, it is not for me or the court to say. But I cannot perceive that it is obnoxious to the objections urged against it in the argument; or especially, that it furnishes ground for avoiding the tax by a judgment of the court. That the confidence reposed in the committee might be abused, is possible. But it is impossible to administer government without reposing confidence in public agents. A reasonable confidence in human agents is essential to society and to the conduct of human affairs; and a law cannot be said to be unconstitutional because it reposes a confidence in public agents which may be abused.

As before said, there is no complaint that the tax imposed upon the appellees in this case is unequal and unjust. I apprehend the case was made in order to have an important principle as to the right of taxation settled, for the benefit of all concerned, as well as the immediate parties to this proceeding. It was believed that in this assessment there was an encroachment upon the constitutional rights of citizens; and this proceeding was properly instituted to test the question. From the best consideration I have been able to give the subject, my mind has been brought to a different conclusion. I do not think that the city council have exceeded their powers in the imposition of this tax. I am, therefore, of opinion, to reverse the judgment of the court below.

Moncure, J., and Christian, J., concurred in the opinion of *Anderson, J.*

Staples and Bouldin, Js., dissented.

Judgment reversed.

IV. Revocation of Tax License.

METROPOLITAN BOARD OF EXCISE V. BARRIE ET AL.

Court of Appeals of New York. September, 1866.
34 New York, 657.

Wright, J. In April, 1866, the legislature passed an act to regulate the sale of intoxicating liquors within the "Metropolitan Police District of the State of New York," excluding the county of Westchester. (Laws of 1866, chap. 598.) . . . . . The act declared "that from and after the first day of May, 1866, no person or persons shall, within the said Metropolitan Police District, exclusive of the county of Westchester, publicly keep or sell, give away or dispose of any strong or spirituous liquors, wines, ale or beer, in quantities less than five gallons at a time, unless he or they may be licensed pursuant to the provisions of this act, and may be permitted by it." (§ 3.)

. . . .

On the third and sixth days of May, and after the act took effect, the defendants, Barrie and Currier, without being licensed pursuant to its provisions, publicly sold, at their respective places of business in Broadway, in the city of New York, to various persons, strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons at a time, to be and which liquors were drank on their premises; and the persons to whom such sales were severally made were not travelers, and were known to the defendants not to be travelers. Both the defendants had, in 1865, under the excise act of 1857 (Laws of 1857, ch. 628), received from the then commissioners of excise for the city and county of New York, a license to sell strong and spirituous liquors and wines, to be drank in their houses and on their premises, which licenses, by their terms were to continue in force till fifty days after the third Tuesday in May, 1866, and at the time of the sales in question had not been revoked by order of any court. The board of excise claimed to recover from these parties, respectively, the penalty of fifty dollars for a violation

of the provisions of the act of April 14, 1866; and the questions submitted were: 1st. Were they liable to pay to the plaintiffs, by reason of such sales on the 3d and 6th of May, 1866, such penalty? and, 2d. Is the act a valid and constitutional law?

. . . .

A law prohibiting the indiscriminate traffic in intoxicating liquors, and placing the trade under public regulation to prevent abuse in their sale and use, violates no constitutional restraints. Is it not an absurd proposition, that such a law, by its own mere force, deprives any person of his liberty or property, within the meaning of the Constitution, or that it infringes upon either of these secured private rights?

Yet this is the only ground its violators can occupy to raise any question as to its validity. They are restrained of no *liberty* except that of violating the law by engaging in a forbidden traffic; and the assumption is not even plausible, that the act works a *deprivation* of a property to anyone, within the meaning of the constitutional restrictions upon legislative authority. It, in terms, it is true, revokes licenses granted under the act of 1857, but that is no encroachment upon any right secured to the citizen as inviolable by the fundamental law. These licenses to sell liquors are not contracts between the State and the persons licensed, giving the latter vested rights, protected on general principles and by the Constitution of the United States, against subsequent legislation; nor are they property in any legal or constitutional sense. They have neither the qualities of a contract nor of property, but are merely temporary permits to do what otherwise would be an offense against a general law. They form a portion of the internal police system of the State; are issued in the exercise of its police powers, and are subject to the direction of the State government, which may modify, revoke or continue them, as it may deem fit. If the act of 1857 had declared that licenses under it should be irrevocable (which it does not, but by its very terms they are revocable), the legislatures of subsequent years would not have been bound by the declaration. The necessary power of the legislature over all subjects of internal police being a part of the general grant of legislative power given by the Constitution, cannot be sold, given away or relinquished. Irrevocable grants of property and franchises may be made, if they do not impair the supreme authority to make laws for the right government of the State; but no one legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. (*Alger* v. *Weston*, 14 Johns. 231; *People* v. *Morris*, 13 Wend. 329;

State v. *Holmes,* 38 New Hamp. 225; *Calder* v. *Kirby,* 5 Gray, 597; *Hun* v. *State,*-1 Ohio, 15; *Wynehamer* v. *The People,* 3 Kern, 378; *License Cases,* 5 How. U. S. R. 504; *Butler* v. *Pennsylvania,* 10 How. 416; *Coates* v. *The Mayor,* 7 Cow., 585; 2 Parsons on Contracts, 538; 3 id. 5th ed. 556.)

. . . .

Errors or mistakes in legislation are not to be referred to the judiciary for correction, or its aid invoked, by men chafing under the restraints of particular statutes, to nullify the legislative power. The judgments should be affirmed.

Judgments affirmed.

. . . .

Such a rule would not apply to a license to practice a profession such as law, which once granted may not be taken away without due process of law, generally a hearing before a court. Exp. Garland, 4 Wallace (U. S.) 334. But the legislature may impose new conditions on one engaged in a profession and provide that one who does not fulfill them shall not practice such profession, as where it provides that one convicted of a felony shall not practice medicine. Hawker v. New York, 170 U. S. 189; Dent v. West Virginia, 129 U. S. 114; Gray v. Connecticut, 159 U. S. 74.

PEOPLE EX REL. PRESMEYER V. BOARD OF COMMISSIONERS.

Court of Appeals of New York. November, 1874.
59 New York, 92.

Grover, J. Section 8 of chap. 549, Laws of 1873 (page 859) . . . . . authorizes the board of excise, upon their own motion, whenever they suspect any person having a license for the sale of intoxicating liquors of having violated any of the provisions of the acts in question, to summon such person before them to inquire into the fact of such violation, and if they find him guilty, cancel his license; and upon the complaint of any resident of the city, etc., that such person has violated any such provision, commands them to summon such party and make inquiry as to the fact complained of. Complaint was made to the board, by a sergeant of police, of Brooklyn, that the appellant, in substance, kept his saloon open on Sunday for the sale of and sold beer therein. Though this is not formally stated in the complaint, yet the facts stated therein show, if true, that this was done there at that time. That keeping open the

saloon on that day for the public sale of beer for a beverage was a violation of the statute, requires no argument.

. . . .

The counsel . . . . . insists that section 8 is unconstitutional, for the reason that it authorizes the conviction of a party of a crime without a trial by jury. But it authorizes nothing more than an inquiry into and determination of the question whether the party licensed continues to be a suitable and proper person to sell intoxicating liquors, the statute itself determining that a violator of the excise laws, while holding a license, is not such a person. That the power to license the sale of intoxicating liquors and to cancel such license when granted is vested in the legislature, has been determined by this court. (*Metropolitan Board of Excise* v. *Barrie,* 34 N. Y. 657.) The mode and manner in which this shall be done rests in the discretion of that body.

The order of the general term affirming the order of the Special Term denying a writ of prohibition, must be affirmed with costs.

All concur.

Order affirmed.

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CHAPTER XIV.

TAXATION BY SPECIAL ASSESSMENTS.

I. Legislative Discretion.

LITCHFIELD V. VERNON.

Court of Appeals of New York. September, 1869.
41 New York 123.

Grover, J. The question whether the act of 1859, chap. 484 of Laws, page 484, is unconstitutional and void, depends upon the inquiry whether the assessments thereby authorized are made in the exercise of the taxing power of the State or of that of eminent domain. If the former, the counsel for the appellant concedes them to be valid. See *People* v. *Mayor of Brooklyn* (4 Comst. 419); *The Sun Insurance Company* v. *The Mayor, etc.* (N. Y. 4 Seld. 241); *Town of Guilford* v. *The Board of Supervisors, Chenango County,* (3 Kern. 143.) If the latter, it is entirely clear that the act is void. An examination of the case shows that, at the time of the passage of the act, the Long Island Railroad Company had the right of way in a tunnel constructed in Atlantic street, Brooklyn, for a railroad operated by steam, and were operating their road thereon; that the legislature deemed it expedient to close the tunnel, grade the street, lay a track upon the surface to be operated by horse power, etc., and to authorize the making of a contract with the railroad company for doing the work and effecting the changes for a sum not exceeding $125,000. To carry into effect this design, the act in question was passed, authorizing the commissioners, whose appointment was provided for in the act, to make the contract, and to make an assessment for the payment of the contract price, together with the incidental expenses upon the lands and premises situate in the district specified in the act. This local assessment for those purposes, it is apparent, was based upon the ground that the territory subjected thereto would be benefited by the work and change in question. Whether so benefited or not, and whether the assessment of the expense should for this, or any other reason, be made upon the district, the legislature was the exclusive judge. The Constitution has

imposed no restriction upon their power in this respect. See cases cited, *supra.* The counsel for the appellant concedes that this is true so far as closing the tunnel and grading the street are concerned, but insists that compensating the company for abandoning the use of steam and substituting therefor horse power, does not come within the like principles. I am unable to see upon what grounds the power of the legislature can be limited in respect to the latter, consistently with the doctrine held by this court, in *The Town of Guilford* v. *The Board of Supervisors, supra.* In that case, it was held, that the legislature had the power to impose a tax upon the inhabitants of the town to pay a claim that had no legal validity, and that could in no way be enforced against the town. In other words, that it was within the power of the legislature to impose a tax upon a locality for any purpose deemed proper, and that its power in this respect is not restricted by the constitution of the State. The other cases show that when the legislature deem it proper to impose the burden upon any specified locality they have the power of so doing. The act of 1859 must, therefore, be held constitutional and valid. The act of 1860, chapter 100, among other things, authorizes an assignment of the assessments to the railroad company, in satisfaction of the money to be paid for doing the work, and making the change in operating the road from steam to horse power. To this I see no objection. It in no ways affects or changes the rights of the owners of the lands assessed. Whether the money, when collected upon the assessments, is paid into the city treasury and then paid to the company, or paid to the company directly, is immaterial to them. Whether the act of 1863, chapter 298, relating to this assessment is constitutional, depends upon the question whether the owners of the lands upon which the assessments were made were personally liable for the payment, or whether the lands only were liable therefor. Section 7 of the act of 1859, among other things, provides, that the collector shall levy and collect the amount of the several assessments therein mentioned in the same manner as the county tax is levied and collected; and the same measures taken to enforce the collection thereof, as are provided by law in regard to the county tax, and in addition the collector is clothed with the same powers as the collectors in the city of Brooklyn. This places the assessments in question upon the same footing as county taxes. That the latter, when assessed upon residents, in respect of real or personal property, creates a personal liability for payment, there can be no doubt. The statutes point out the mode of enforcing this liability in a way more efficacious than that provided by law for other liabilities. Taxes as-

sessed upon non-resident real estate impose no personal liability upon the owner. In respect to these, the collector has no duty except to receive payment if offered, and if not, to make return to the proper officer. This being so, the legislature had the power to provide such remedy to enforce the liability, whether by action or otherwise, as it deemed proper. The rule is well settled, that the remedy to enforce rights is, at all times, within the control of the legislative power, with the exception that it cannot deprive a party of all efficient remedies to enforce rights based upon contract, as that would in effect impair or destroy the obligation of the contract, which is prohibited by the federal constitution. But new and additional remedies may be provided, as in the present case. It is unnecessary, in the present case, to determine whether section 4 of the act of 1862, authorizing the company to appoint a collector, is in conflict with section 2, article 10, of the Constitution; as the plaintiff, in bringing the action, is not exercising the functions of any officer, but is acting as a suitor only. The legislature, having power to authorize an action for the collection of the assessment, had also power to provide who should be plaintiff therein. This brings us to the only remaining question in the case; and that is whether there is any competent evidence authorizing a finding that a majority of the owners of land, within the territory made subject to assessment, made application to the common council, requesting them to make application to the Supreme Court for the appointment of three commissioners, as provided by the first section of the act of 1859. That section provides that the common council of the city of Brooklyn shall, upon petition or application of the majority of the owners of the land, at the time of the passage of the act, in the district proposed to be assessed thereby, make application to the Supreme Court, at Special Term, etc. The act itself is wholly silent as to how this essential fact shall be proved. The act to consolidate the cities of Brooklyn, etc., referred to in this section, for the mode of proceeding in procuring the appointment of commissioners, contains nothing applicable to the present case in this respect. The right of the common council to apply for the appointment of the commissioners, lies at the foundation of the whole proceeding. Unless this right existed, all the proceedings in appointing the commissioners, and subsequent thereto, are void. This right depends upon the question whether a majority of the land owners petitioned the common council to proceed under the act. In the absence of such petition, the common council had no authority in the premises, and nothing could be done under the act. The act does not provide for the determination of this fact by

the common council nor by the Special Term upon the presentation of the petition for the appointment of the commissioners. The plaintiff seeks to show that the defendant became liable to pay the assessment. It was incumbent upon him to show the existence of the facts creating the liability. The act being silent as to what should be deemed proof of the fact that a majority of the land owners petitioned the council, the plaintiff was bound to prove such fact by competent common law evidence. This could be done by proof, showing who were the owners of the land, at the time of the passage of the act, and that a majority of such persons petitioned the common council, as required by the first section of the act. Neither the application of the council to the court, nor the affidavit of the mayor, accompanying such application, was evidence of this fact against the defendant. (*Sharp* v. *Speir,* 4 Hill 76, and cases cited.) There was no competent evidence of this fact given upon the trial, and the exception to the findings of this fact by the judge was well taken. Upon this ground the judgment should be reversed, and a new trial ordered.

All the judges concurred for reversal, except Hunt, Ch. J., and Mason, J., who were for affirmance, and Lott, J., who did not vote.

Judgment reversed, and a new trial ordered.

For the power of the legislature in New York to apportion taxation in accordance with its ideas of benefit see People v. Mayor, 4 N. Y. 419, *supra.*

HAMMETT V. PHILADELPHIA.

Supreme Court of Pennsylvania. March, 1869.
65 Pennsylvania State, 146.

This was a scire facias sur municipal claim by the City of Philadelphia, to the use of Charles E. Jenkins and Jonathan Taylor, against Barnabas Hammett, issued July 18th, 1868.

. . . .

On the 24th of October, 1868, judgment was entered for the plaintiff, for want of a sufficient affidavit of defence, and damages were assessed at $4462.14. The defendant took a writ of error and assigned for error, that the court erred.

4. In not deciding that the ordinance and Act of Assembly were respectively null and void by reason of their being in violation of the constitution of the state, and of their being a delegation and ex-

ercise of a power to impose upon a few individuals a heavy expenditure, which should be borne by the public at large.

. . . .

SHARSWOOD, J. It may be considered as a point fully settled and at rest in this state, that the legislature have the constitutional right to confer upon municipal corporations the power of assessing the cost of local improvements upon the properties benefited. It is a species of taxation; not the taking of private property by virtue of eminent domain.

. . . .

There is, indeed, no clause in the Constitution of Pennsylvania which restricts the power of taxation in the legislature as is to be found in the constitutions of many of our sister states. Yet it must be confessed that there are necessary limits to it in the very nature of the subject. It is very clear that the taxing power cannot be used in violation of provisions in the Bill of Rights, everything in which is "excepted out of the general powers of government, and shall forever remain inviolate." There is no case to be found in this state, nor, as I believe after a very thorough research, in any other—with limitations in the Constitution or without them—in which it has been held that the legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. . . . . .

It may be shown logically, and that without difficulty, that such a doctrine lands us in this absurd proposition: That the whole expenses of government, general and local, may be laid upon the shoulders of one man, if one could be found able to bear such a burden. A conclusion so monstrous shows that the premises must be wrong. Such a measure would not be taxation, but confiscation.

. . . .

It remains to apply these principles to the case presented to us upon this record. The original paving of a street brings the property bounding upon it into the market as building lots. Before that, it is a road, not a street. It is therefore a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. Perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities if the lots differ in situation and depth. Appraising their market values, and fixing the proportion according to these, is a plan open to favoritism or corruption, and other objections. No system of taxation which the wit of man ever devised has been found perfectly equal.

But when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality—for the general good—as cleaning, watching and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments.

This case indeed is still clearer than that which I have put of a simple repairing. Broad street in front of the lot of the plaintiff in error, was paved only a few years ago in the ordinary way in which all the other streets of the city have been paved—with cobble stones—and whatever advantage there was in his owning property on so wide and handsome a street was paid for by him in the increased cost assessed upon him for the paving. Without any pretence that it has been worn out and required to be replaced by another, it was torn up, and a new and very expensive wooden pavement substituted. The plaintiff in error did not remain silent. He protested and remonstrated, and filed a bill in equity to restrain the work before it began. The city and their contractors can plead no equity against him. It is said that it was all for his interest. But whether he was mistaken or not as to his own interest, he was the judge of that, not this court. The case is not to be decided upon any particular results in this instance, but on general principles which can work with safety and advantage to the public in all other cases. Mr. Hammett may have been specially benefited; though we have no evidence of that on this record, and we have no right to consider evidence derived from any other source, but the next experiment may be unsuccessful and ruinous. . . . . . The object of this improvement is not to bring or keep Broad street as all the other streets within the built up portions of the city are kept, for the advantage and comfort of those who live upon it, and for ordinary business and travel, but to make a great public drive—a pleasure ground—along which elegant equipages may disport of an afternoon. We need look no further than the preamble of the act authorizing the improvement of Broad street, passed March 23d, 1866 (Pamph. L. 299), for evidence that is for the general public good, not for mere peculiar local benefit. It states it to be "for the uses and purposes of the public, and the benefits and advantages which will enure to them by making and forever maintaining Broad street, in the city of Philadelphia, for its entire length as the same is now opened, or may hereafter be opened, the principal avenue of said city." Thus we have special taxation

authorized, for an object avowed on the fact of the act to be general and not local, which relieves the case of all difficulty as to the fact. We have only to advance the project a few steps further to see how preposterous is the idea of paying for such an improvement by assessments. In the natural course of things, we may expect that it will be proposed to adorn this principal avenue with monuments, statuary and fountains. Will their cost be provided for in the same way? How much does this plan differ from a proposition to erect new public buildings on Independence Square, and assess the cost on lots situated on the neighboring streets? On the same principle lots on the public squares could be assessed to pay for any new project to beautify and adorn them, no matter how great the expense. It might be argued with equal plausibility that their value was increased by the improvement. We must say at some time to this tide of special taxation, thus far thou shalt go and no further. To our own decisions, as far as they have gone, we mean to adhere, but we are now asked to take a step much in advance of them. This we would not be justified by the principles of the constitution in doing.

Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed, or appears to be for general public benefit.

There have been several other points raised and discussed on this record, but we are not obliged to consider them, and as the conclusion at which we have arrived that the Act of Assembly of March 23d, 1866, so far as it authorizes the Councils of the city of Philadelphia "to enact such ordinances or resolutions with such conditions or stipulations as may require the cost of said improvements to be paid for by the owners of property abutting on said street," is unconstitutional and void, disposes of the whole case, it is unnecessary to discuss any other.

Judgment reversed.

READ, J., dissenting.

The rule of the principal case as to the impropriety of levying special assessments for repaving streets is not usually adopted. See Cooley, Taxation, 3rd edition, p. 613.

STATE V. CITY OF NEWARK.

New Jersey Supreme Court. June, 1858.
3 Dutcher 186.

This *certiorari* was brought to set aside an assessment, made on property of the New Jersey Railroad and Transportation Company, for widening Market street in the city of Newark.

THE CHIEF JUSTICE. By the act to incorporate the city of Newark passed the 29th day of February, 1836, the common council are authorized to cause a just and equitable assessment of the damages and expenses incident to the opening and widening of streets in said city to be made among the owners and occupants of all the houses and lots intended to be benefited thereby, in proportion to the advantages each shall be deemed to acquire. *Elmer's Dig.* 656, § 34. By a supplement to the charter, approved March 16th, 1854, *Pamph. Laws* 395, § 6, it is enacted, "that whenever any street, or part of a street, in the city of Newark, occupied or used by the track of any railroad company, shall require to be altered or widened for the convenience of public travel, and proceedings for the altering and widening the same shall have been taken under the act to which this is a supplement, it shall be lawful for the commissioners, whose duty it may be to make a just and equitable assessment of the whole amount of the damages and expenses of such altering or widening among the owners and occupants of all the houses and lots intended to be benefited thereby, to assess such proportion of said damages and expenses upon the corporation or company owning or using said railroad track as to them shall seem equitable and just; and such assessment shall be a lien upon any property of said company in the city of Newark, and may also be enforced in the same manner as the assessment upon said owners and occupants of houses and lots intended to be benefited thereby.

Under the provisions of the charter, the common council, in 1854, took measures for altering and widening, for the convenience of public travel, the part of Market street extending from the New Jersey railroad depot to River street, on either side of the tracks of the New Jersey Railroad and Transportation Company, which tracks are owned or used by said company. The amount of the damages and expenses of the altering and widening of said street were duly ascertained at $28,788.37. Of this amount there was assessed upon nine houses and lots of the railroad company about $1250, and upon the company itself owning or using the railroad track $18,000, that be-

ing the amount which it seemed to the commissioners equitable and just to assess on the railroad company under the provisions of the charter.

The company seek relief from the assessment made upon them as owners of the railroad track, and also from the assessment upon their houses and lots.

By the charter of the railroad company, it is enacted that the company shall pay a tax of one-half of one per cent upon their capital stock, and that no other or further tax or imposition shall be levied or imposed upon the company. *Harrison* 385, § 18. Is the assessment upon the company, as owners of the railroad, for the purpose of widening Market street, a tax or imposition within the meaning of the charter?

In the case of *The City of Paterson* v. *The Society for Establishing Useful Manufactures,* (4 Zab. 385) it was held, by this court, that an assessment upon city lots, for grading and paving the street upon which they are situate, and for curbing and gravelling the sidewalk in front of the respective lots, was not a tax within the meaning of that clause of the society's charter which exempted their property from all taxes, charges, and impositions under the authority of this state.

The same principle has been recognized and adopted in *The Matter of the Mayor of New York,* 11 Johns R. 77; *The Northern Liberties* v. *St. John's Church,* 13 Penn. St. R. 104; *Alexander and Wilson* v. *The Mayor,* &c., 5 Gill 396. The subject has undergone an elaborate examination in the more recent case of *The Mayor and City Council of Baltimore* v. *The Proprietors of Green Mount Cemetery,* 7 Maryland R. 517. The charter of the cemetery company provided, that the land appropriated as a cemetery, so long as used for that purpose, "should not be liable to any tax or public imposition whatever." It was held, nevertheless, that the cemetery company were not exempt from a paving tax for paving a street in front of their property; that the intent of the legislature was to exempt the property from all taxation or impositions imposed for *the purpose of revenue,* but not to relieve it from such charges as are inseparably incident to its location in reference to other property.

It has been made a question, whether an assessment upon property to pay for opening or paving a street, in a ratio of the benefit conferred, is a tax within the appropriate meaning of that term, or an *assessment* for benefits conferred upon the property of the individual. There are in the legislation of every state a variety of statutes, whose primary design is the improvement of private property and in

which the public interest is merely incidental. To effectuate the object of these laws, they authorize assessments, in the nature of taxes, upon individual property, and direct the mode of enforcing them. Of this nature are many statutes, public and private, in relation to the claiming of drowned lands and the draining and fencing of swamps and meadows. The immediate design of these acts is the improvement of private property, each individual interested being required to contribute to the expense in proportion to his interest in the property and to the benefit supposed to be conferred upon him. The public are interested in this class of improvements only as they tend to improve the salubrity of particular districts or to increase the general wealth of the community. These assessments have little analogy to public taxes, either in the purpose for which they are assessed or in the mode of enforcing them; so a city ordinance requiring every lot holder to drain the surface water from his lot, to avoid the creation of a nuisance affecting the public health, and in case of failure directing it to be done at public expense, and the amount to be a lien upon the respective lots, though the design be purely a public benefit, savors more of a merely police regulation than a measure of taxation. On the other hand, where lands are drained by public authority to preserve the public health, or sewers are constructed for common drainage and at public expense, and the amount thus drawn from the common treasury supplied by taxation upon the whole community, or upon that portion of it specially benefited, in either event the amount collected is a tax.

. . . .

The theory upon which such assessments are sustained as a legitimate exercise of the taxing power is, that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which, as one of the community, he receives in all public improvements, to the precise extent of the assessment. 23 *Conn.* 204.

If the assessment made upon the railroad company is to be regarded as an exercise of the power of taxation, without reference to the special benefit conferred upon the company, then clearly the assessment is illegal.

But it is insisted that the assessment made upon the company is not a tax within the meaning of the exemption contained in the charter of the company, and falls directly within the principle recognized by this court in *The City of Paterson* v. *The Society, &c.*, 4 Zab. 386.

The assessment is, by the terms of the act, directed to be made, and is in fact made, not upon the property of the company, but

upon the corporation itself. It is not to be assessed (as in the case of houses and lots intended to be benefited) in proportion to the advantages the company shall be deemed to acquire; but the commissioners are to assess upon the company such portion of the damages and expenses as to the commissioners shall deem equitable and just. In what respect does this differ in principle from an ordinary case of taxation? The assessment is not required to be made with any regard to the benefit the improvement may confer upon the company. From all that appears, the assessment may have been graduated by a regard to the ability of the company to pay—to the value of its stock—or to the amount of travel that passed through the street upon the railroad. It does not appear that the improvement added any value to the road itself or to the stock of the company.

It is urged that the widening of the street gave increased facility to the operations of the railroad, by relieving the crowded state of the street, thereby diminishing the danger of accidents, allowing an increased rate of speed, and thus indirectly adding to the value of the road. But the same argument would apply with equal force to sustain an assessment against the company for paving, lighting, grading, or otherwise improving the streets and increasing the facilities of travel; indeed it is difficult to imagine any purpose for which a municipal tax could be raised that might not, in the same way, be shown to be indirectly beneficial to the railroad company. But in what mode is the corporation specially benefited over any and every inhabitant of the city or traveller through its streets? If the assessment against the railroad company may be sustained upon the ground of special benefits to the corporation from the increased facilities of travel afforded by widening the street, an assessment may be sustained upon the same ground against the owner of every express wagon or stage coach that travels the street. The assessment in this case is a clear exercise of the taxing power. It is made for a public purpose, and confers no special benefit upon the property of the company.

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II. Methods of Assessment.

FRENCH V. BARBER ASPHALT PAVING COMPANY.

Supreme Court of the United States. October, 1900.
181 United States 324.

This was a suit instituted in the circuit court of Jackson County, Missouri, by the Barber Asphalt Paving Company, a corporation whose business it was to construct pavements composed of asphalt, against Margaret French and others, owners of lots abutting on Forest avenue in Kansas City, for the purpose of enforcing the lien of a tax bill issued by that city in part payment of the cost of paving said avenue.

The work was done conformably to the requirements of the Kansas City charter, by the adoption of a resolution by the common council of the city declaring the work of paving the street, and with a pavement of a defined character, to be necessary, which resolution was first recommended by the board of public works of the city.

. . . .

The cost of the pavement was apportioned and charged against the lots fronting thereon according to the method prescribed by the charter, which is that the total cost of the work shall be apportioned and charged against the lands abutting thereon according to the frontage of the several lots or tracts of lands abutting on the improvement. . . . . .

The defendants pleaded and contended . . . . . that the charter of Kansas City purports to authorize the paving of streets and to authorize special tax bills therefor, charging the cost thereof on the abutting property according to the frontage, without reference to any benefits to the property on which the charge was made and the special tax bills levied, and that such method of apportioning and charging the pavement was contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

The judgment of the circuit court of Jackson county was for the plaintiff company for the amount due on the tax bill and for the enforcement of the lien. From this judgment an appeal was taken to the Supreme Court of Missouri, and, on November 13, 1900, the judgment of the circuit court was affirmed, and thereupon a writ of error from this court was allowed.

Mr. Justice SHIRAS, after stating the case, delivered the opinion of the court.

In its opinion in this case the Supreme Court of Missouri said that "the method adopted in the charter and ordinance of Kansas City of charging the cost of paving Forest avenue against the adjoining lots according to their frontage had been repeatedly authorized by the legislature of Missouri, and such laws had received the sanction of this court in many decisions. *St. Louis* v. *Allen,* 53 Mo. 44; *St. Joseph* v. *Anthony,* 30 Mo. 537; *Neenan* v. *Smith,* 50 Mo. 525; *Kiley* v. *Cranor,* 51 Mo. 541; *Rutherford* v. *Hamilton,* 97 Mo. 543; *Moberly* v. *Hogan,* 131 Mo. 19; *Farrar* v. *St. Louis,* 80 Mo. 379."

. . . .

Accordingly the Supreme Court of Missouri held that the assessment in question was valid, and the tax imposed collectible. And, in so far as the constitution and laws of Missouri are concerned, this court, of course, is bound by that decision.

But that court also held, against the contention of the lot owners, that the provisions of the Fourteenth Amendment of the Constitution of the United States were not applicable in the case; and our jurisdiction enables up to inquire whether the Supreme Court of Missouri were in error in so holding.

The question thus raised has been so often and so carefully discussed, both in the decisions of this court and in the state courts, that we do not deem it necessary to again enter upon a consideration of the nature and extent of the taxing power, nor to attempt to discover and define the limitations upon that power that may be found in constitutional principles.

. . . .

We do not deem it necessary to extend this opinion by referring to the many cases in the state courts, in which the principles of the foregoing cases have been approved and applied. It will be sufficient to state the conclusions reached, after a review of the state decisions, by two text-writers of high authority for learning and accuracy:

"The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

"The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.

"The whole cost in other cases is levied on lands in the immediate vicinity of the work.

"In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." Cooley on Taxation, 447.

"The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. . . . . . Whether the expense of making such improvements shall be paid out of the general treasury, or assessed upon the abutting or other property specially benefited, and, if in the latter mode whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency." Dillon's Municipal Corporations, vol. 2, section 752, 4th ed.

This array of authority was confronted in the courts below, with the decision of this court in the case of *Norwood* v. *Baker,* 172 U. S. 269, which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law, under which the improvement is made, provides for a preliminary hearing as to the benefits to be derived by the property to be assessed.

But we agree with the Supreme Court of Missouri in its view that such is not the necessary legal import of the decision in *Norwood* v. *Baker.* That was a case where by a village ordinance, apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the costs and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This

court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessments upon Mrs. Baker's property, but said:

"It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expenses of the opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the State."

That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in *Parsons* v. *District of Columbia,* 170 U. S. 45, 56, and in *Spencer* v. *Merchant,* 125 U. S. 345, 357.

It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of the majority of the judges of this court, was the nature and effect of the proceedings in the case of *Norwood* v. *Baker.*

But there is no such a state of facts in the present case. Those facts are thus stated by the court of Missouri:

"The work done consisted of paving with asphaltum the roadway of Forest avenue in Kansas City, thirty-six feet in width, from Independence avenue to Twelfth street, a distance of one-half a mile. Forest avenue is one of the oldest and best improved residence streets in the city, and all of the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in distance and quality. There is no showing that there is any difference in the value of any lots abutting on the improvement."

What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the State as consistent with constitutional principles.

The judgment of the Supreme Court of Missouri is *affirmed.*

MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA) dissenting.

WASHINGTON AVENUE.

Supreme Court of Pennsylvania. October, 1871.
69 Pennsylvania State 352.

On the 14th of September, 1870, the court (Stowe and Collier, JJ.) decreed an injunction against the commissioners, restraining them from collecting the tax under cover of the Act of 1870.

The commissioners appealed to the Supreme Court, and assigned the decree for error.

AGNEW, J.—This case presents a new question upon the power of taxation: the authority of the legislature to compel the owners of farm lands, lying within one mile on each side of a public highway, to pay for grading, macadamizing, and improving it, by an assessment upon their lands by the acre. It is not a case of municipal taxation by a county, township, city or borough, for local improvements. The law created a corporation of seven commissioners to take charge of the avenue, make the improvements, lay and collect the taxes, and provide for the collection of tolls for its use. The road has no respect to township authorities, township lines, or the mode of levying township taxes. It is not a case of taxation of frontage, for the lands of the plaintiffs in the bill do not abut upon the avenue, but merely lie within the prescribed lines of taxation. It is not a case of local improvement, and taxation therefor, upon those exclusively, or even those peculiarly benefited; for the master finds that some of the plaintiffs do not use the avenue, but travel on parallel roads, that persons two miles outside, and on each side of the lines of taxation are nearly, or quite, as much benefited as those within these lines, and that owners of property and the public, far beyond the southern terminus of the avenue in the direction of Canonsburg and Washington

are greatly benefited. In short he finds that the proposed improvement will be a *general public benefit.*

Washington avenue is but seven miles long, passing through six townships and part of a seventh; but if this mode of taxation, to grade, macadamize and improve it, can be maintained, the legislature, on the same principle, can make a turnpike, a canal, a railroad, or any other highway across the state, and compel the owners of land within one, or any fixed number of miles, to pay for it, and can assess the cost per acre, not only at $6, $4 and $3 per acre, as in this law, but at sixty, forty, thirty, or any number of dollars, necessary to build the highway. If this be legitimate taxation, it has no bounds, for it must be conceded that the power of taxation, properly so called, has no limit in the Constitution, and is bounded only by the necessities of the state or the will of the people.

The practice of municipal taxation by counties, townships, cities and boroughs for local objects, had its origin in necessity and convenience. Hence roads, bridges, culverts, sewers, pavements, school-houses, and like local improvements, are best made through the municipal divisions of the state, and paid for by local taxation. These have always been supported as proper exercises of the taxing power. Nor is this mode of taxation inconsistent with our notions of the right of private property and of the equality of burdens; for each municipality in its turn (sooner or later) by a tax on all its inhabitants pays only for what it makes and enjoys within its own limits, and thus in the course of time the burthen is equalized upon all, as every portion of the state makes its own improvements and enjoys their peculiar benefits. The practice was followed by another advance in the local mode of taxation. In cities and towns where population was dense the authorities began to make improvements of special advantage to certain of the citizens at their expense; such as footwalks in the front of dwellings, and pavements in those streets which were well built up, and where good carriage-ways were needed. Here, too, though a step far in advance of the system of general taxation, our notions of private right were not violated; for the advantages of the owners were so clear in the promotion of their convenience, and the enhanced value of their lots, caused by improved footwalks and carriage-ways, that the burthen was duly compensated, and again equality was produced as each street or alley came to be paved. So far, public opinion and ancient and long-continued legislative practice have sustained local taxation with great unanimity, and this is

strong evidence of the true interpretation of the constitutional power of the legislature to authorize municipal taxation of this sort. Indeed, the general acquiescence of the people in this exercise of the power is so clear, that few cases are to be found in the books, wherein any question has been made upon the power itself.

. . . .

Next came another step forward in the exercise of the power of local taxation, but one more doubtful, and at first view not so easily perceived to be within the legislative power; that is to say, the assessment of the property of one man to pay the compensation due to another whose property has been taken for a public use. Here the right to assess seems to be further removed from the true source of the power, and it is more difficult to discern the liability of the few to pay what the state herself seemingly should pay by general taxation, for property taken under the power of eminent domain.

. . . .

The exercise of this power for benefits . . . is not by way of eminent domain, in the usual sense of this term, for it is not a taking at all, followed by compensation for the taking; but it is a special mode of taxation, which equalizes burdens by a counterbalance of benefits, whereby those benefited more pay more, and those benefited less pay less. It is thus special as contradistinguished from general taxation, but not special as making one man to pay all or more than his just proportion of a common burden. General taxation pays no regard to equality of burden, further than to lay the tax in proportion to the amount of the assessable property of each tax-payer throwing out of view all questions of special benefit. So long, therefore, as the benefits of each tax-payer are justly and impartially assessed under the special system, I cannot see that the general system is more just or impartial. Indeed, if faithfully executed the special system seems to be more equal and just, for, under the general system, some may be greatly benefited more than others, and yet pay but a small proportion of the tax, considering what they receive. For example, a poor man may send many children to school, while a man of large property, having none to send, may pay a large tax—and a man being greatly benefited by a public road may pay a very small proportion of the tax which keeps it up.

Taxation, according to benefits received, is neither unequal nor unjust, and cannot, therefore, come into conflict with those clauses

in the Bill of Rights, which regard as sacred the right of private property. So long, therefore, as a law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burdens, it cannot be said to exceed the legislative power of taxation, when exercised for proper objects. It is on this ground only that assessment according to the frontage of property on a public street to pay for its opening, grading, and paving, is to be justified. As a practical result, in cities and large towns, the per-foot front mode of assessment reaches a just and equal apportionment in most cases. Hence this mode has been deemed a reasonable exercise of the taxing power in such places, with a view to taxation according to the benefits received. Whatever doubt might have been originally entertained of it as a substitute, which it really is, for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decision, it would ill become us now to unsettle its foundation by disputing its principle. But it is an admitted substitute, only because practically it arrives, as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties. Hence the fairness of the rule charging benefits by frontage was a conceded point in Hammett v. The City of Philadelphia, 15 P. F. Smith 155. But this rule, as a practical adjustment of proportional benefits, can apply only to cities and large towns, when the density of population along the street, and the small size of lots, make it a reasonably certain mode of arriving at a true result.

To apply it to the country and to farm-lands would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law; so that at the very first blush, every one would pronounce it to be palpably unreasonable and unjust. Judged by this rule for deciding in a question of constitutional power, the law in this case cannot stand.

. . . .

In the present case, an examination of the facts in which the per-foot frontage rule is based, discloses at once the want of analogy between large farms with single occupants or owners, or wild and untenanted land, in the country, and the small lots of a crowded street in a populous town. The legislature, therefore, made a mistake in fixing such a burden upon the lands along the route of this avenue. It is in fact nothing more than a law to coerce certain landowners to pay for a public improvement in

which their interest is no greater, and as to some of them, not so great as that of many others who pay nothing; and it offends against the clear intent and spirit of the Bill of Rights. There is no case in our books, wherein the legislative power to tax has been maintained with greater vigor and ability than *Sharpless* v. *The City of Philadelphia,* 9 Harris, yet even there, the then Chief Justice admits (p. 166), that the exercise of the power may be forbidden by clear implication, as well as express restriction. "It is not every act the legislature may choose to call a tax-law that is constitutional." "The whole public burden," he contends, "cannot be thrown upon a single individual, under pretence of taxing him." This is a concession that taxation has a limit *per se,* and is not always co-extensive with legislative exaction. When, therefore, the Constitution declares in the ninth article, that among the *inherent* and *indefeasible* rights of men is that of acquiring, possessing, and protecting property,—that the people shall be secure in their *possessions,* from *unreasonable seizures,*—that no one can be *deprived* of his *property* unless by the judgment of his peers, or the law of the land—that no man's *property* shall be taken or applied to public use without *just compensation* being made—that every man for an injury to his *lands or goods* shall have remedy by *due course of law,* and *right* and justice administered without sale, denial or delay—and that no law impairing contracts shall be made—and when the people, to guard against transgressions of the high powers delegated by them, declared that these rights are excepted out of the general powers of government, and shall forever remain inviolate, they, for their own safety, stamped upon the right of private property, an inviolability which cannot be frittered away by verbal criticism on each separate clause, nor the united fagot broken, stick by stick, until all its strength is gone.

There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions, that covers it with an aegis of protection against all unjust, unreasonable and palpably unequal exactions under any name or pretext. Nor is this sanctity incompatible with the taxing power, or that of eminent domain, where for the good of the whole people, burdens may be imposed or property taken.

I admit that the power to tax is unbounded by any express limit in the Constitution—that it may be exercised to the full extent of the public exigency. I concede that it differs from the power

of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But nevertheless taxation *is* bounded in its exercise by its own nature, essential characteristics and purpose. It must therefore visit all alike in a reasonably practicable way of which the legislature may judge, but within the just limits of what is taxation. Like the rain it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation, extortion, not assessment, and falls within the clearly implied restriction in the Bill of Rights.

It is found by the master, and if it had not been found by him, it is perfectly obvious, that this avenue will be one of general public benefit; and especially that it will be of great convenience and individual benefit to citizens and taxpayers, beyond the limit of taxation along the road, both laterally and terminally.

Indeed, beyond its southern terminus its benefits reach a considerable distance into the county of Washington. This brings it within the principle of Hammett v. The City of Philadelphia, *supra;* expressed in these words, at the conclusion of the opinion of our brother Sharswood: "Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of these benefits. They cannot be imposed when the improvement is either expressed, or appears to be, for general benefit." I concurred in that opinion, and I see no reason to regret my concurrence; but on the contrary, I see in the present case much to confirm it; and the examination I have just made into the power of special taxation, it seems to me, tends to confirm and strengthen what was so well reasoned in Hammett v. The City. Indeed I consider it a fortunate circumstance that that case came up, for it led into an inquiry into the power of special taxation, which was in danger of running wild by insensible degrees and leading, before we had become aware of it, into the exercise of a bastard power, dangerous to the right of private property, and violative of the provisions in the Bill of Rights, placed there for its protection. In questions of power exercised by agents, it sometimes is the misfortune of communities to be carried, step by step, into the exercise of illegitimate powers without perceiving the progression, until the usurpations become so firmly fixed by precedents,

it seems to be impossible to recede or to break through them. The majority opinion in that case did not then, and this opinion does not now, dispute the long-recognized power of local taxation for local improvements, according to the benefits conferred; but they meet and dispute departures from that power, which if recognized, will land in the overthrow of the right of private property. Laws which cast the burdens of the public on a few individuals, no matter what the pretence, or how seeming their analogy to constitutional enactments, are in their essence despotic and tyrannical, and it becomes the judiciary to stand firmly by the fundamental law, in defence of those general, great, and essential principles of liberty and free government, for the establishment and perpetuation of which the Constitution itself was ordained. Should we now suffer this law to pass without judicial criticism and condemnation upon a false analogy of the frontage rule in cities and large towns, we should leave open a door for future impositions upon private property, so wide and specious, errors the most odious and of enormous proportions would enter in.

For these reasons the decree below is affirmed.

III. Powers of Local Authorities.

WRIGHT ET AL. V. CITY OF CHICAGO.

Supreme Court of Illinois. April, 1858.
20 Illinois, 252.

This was an application for judgment against certain property for nonpayment of a special assessment, levied by the common council of the city of Chicago, upon said property for dredging, or otherwise deepening the Chicago river and its branches, between the west line of Franklin street, north line of Lake street, north line of Kinzie street, and the established dock lines, and which assessment was ordered by said common council, upon the report and recommendation of the city superintendent of said city of Chicago. There was an order of sale, under the assessment, of certain lots benefited, the owners of which lots sue out this writ of error.

Caton, C. J.—We have arrived at our conclusions in this case with reluctance. That there is as much propriety in requiring

the owners of property benefited by the deepening of the harbor, to pay the expenses of the improvement, as there is in requiring those benefited by widening it, or improving a street, would seem to be self-evident. To say that the owner of a dock, which is useless because of the want of water to bring vessels to it, shall not pay the expense of deepening the harbor in front so as to make it valuable, while the owner of the lot shall be compelled to pay for paving the street in its neighborhood, we cannot doubt is unjust, and had we the making of the laws, we could not hesitate to affirm this judgment. Our duty is confined to finding out what the laws are, and expounding them. It is admitted in the argument, for it could not be denied, that there is no provision in the city charter, and no law upon the statute book authorizing special assessments to deepen the river, and it cannot be pretended that they are authorized by the common law. The city government has express authority to raise funds by general taxation for general purposes. It has general authority by the second clause of the fourth section of the fourth chapter of its charter, "to remove and prevent all obstructions in the waters which are public highways in said city, and to widen, straighten and deepen the same," and by the fifty-third clause of the same section, very ample jurisdiction over the harbor is conferred upon the city government, and the extent of the harbor is defined. By the fifty-fourth clause of the same section, exclusive control is given to the city government over the streets, alleys, sidewalks and bridges of the city, and to open, widen and straighten the same, and to put drains and sewers therein. By conferring these powers, it was not supposed by the legislature that authority was given to levy special assessments upon the property benefited thereby to pay for such improvements. If this were not sufficiently manifest from the fact that these provisions are silent about any such authority, it becomes so when we see that by other provisions of the charter express authority is given to levy such special assessments to defray the expenses of a part of such improvement. The sixth and seventh chapters of the charter are devoted to the subject of the improvement of streets, etc., and define for what improvements special assessments may be laid upon the property benefited, and the mode of levying and collecting them, the particular provisions of which it is unnecessary to state. It is enough that the legislature deemed it necessary to make special provisions, granting particular authority to levy special assessments for certain specified improvements. It shows that there was no intention to grant authority to make

such special assessments by simply conferring authority to make the improvements. This view is more especially confirmed, if possible, by the fact that the legislature has, by a separate clause, conferred special authority upon the common council to levy special assessments upon property benefited thereby, for *widening* the river. This is found in the fifth section of the act of 27th February, 1845, concerning wharfing privileges in Chicago, and which is substantially an amendment to the city charter. That section authorizes the common council to widen the Chicago river and its branches within the city, by cutting away lots and streets on its borders, and "such proceedings shall be had for the condemnation and appropriation of such lot or lots or part of a lot, and the assessment of damages and benefits, as are authorized and directed by the act to incorporate the city of Chicago and the acts amending the same, for the opening of streets and alleys; and the provisions of said act shall apply to the widening of said river and its branches so far as they are applicable." This evidently refers to and adopts the sixth chapter of the city charter, the tenth section of which expressly authorizes special assessments upon property benefited by the improvement. While we thus find a special provision authorizing by a fair and reasonable construction special assessments to widen the river, there is no authority anywhere to be found, even by implication, for such assessments to deepen the river, and this special provision in the one case and not in the other, by every known rule for construing statutes, is a clear indication of the legislative will, that no such power was intended to be granted in the case omitted. We must hold then that this special assessment was void for the simple reason that the legislature has not seen proper to confer any authority to levy it. Without law it could not be done.

The judgment must be reversed.

Judgment reversed.

PHILADELPHIA V. PENNSYLVANIA HOSPITAL.

Supreme Court of Pennsylvania. October, 1891.
143 Pennsylvania State, 367.

Opinion, Mr. Justice STERRETT:

In this action of scire facias sur municipal claim for curbing, etc., the defendant's affidavit of defense was adjudged insufficient, and judgment was accordingly entered in favor of plaintiff for the amount of its claim. From that judgment this appeal was taken by defendant. The facts are fully presented in the statement of claim and affidavit of defence. There is no question as to the curbing having been properly done, nor as to the cost thereof. The sole question is whether, upon any legal ground, either as a tax or under the police power of the city, the assessment in question can be sustained.

It is contended by defendant that an assessment for curbing is a tax; and inasmuch as its "estate and property, both real and personal, are by law exempt from the payment of tax of any kind whatsoever," the plaintiff's case cannot be enforced; and in support of the position, Olive Cemetery Co. v. Philadelphia, 93 Pa. 129, and other taxes, recognizing the right of local taxation for certain local purposes are cited. But it is a mistake to assume that the authority vested in municipal corporations to require owners to curb, pave, and keep in repair the sidewalks in front of their respective properties, rests upon the same basis as the right of local taxation recognized in the cases referred to. There is a marked distinction between them. In the former, a duty is imposed on the property owner in the nature of a police regulation. In the latter, no such duty is cast upon him. This distinction was clearly pointed out by the present Chief Justice in Wilkinsburg Bor. v. Home for Aged Women, 131 Pa. 117, which, in principle, is identical with this.

In Cooley on Taxation, 398, the learned author says: "The cases of assessments for the construction of walks by the sides of the streets in cities and other populous places are more distinctly referable to the power of police. These footwalks are not only required, as a rule, to be put and kept in proper condition for the use of the adjacent proprietors, but it is quite customary to confer by municipal charters, full authority upon municipalities to order the walks, of a kind and quality by them prescribed, to be constructed by the owners of adjacent lots at their own expense, within

a time limited by the order for the purpose; and that, in case of their failure so to construct them, it shall be done by the public authorities, and the cost collected from such owners or made a lien upon their properties. When this is done, the duty must be looked upon as being enjoined as a regulation of police, made because of the peculiar interest such owners have in their walks, and because their situation gives them peculiar fitness and ability for performing, with promptness and convenience, the duty of putting them in proper shape, and of afterwards keeping them in a condition suitable for use. . . . The courts distinguish this from taxation, on the ground that the peculiar interest which those upon whom the duty is imposed have in its performance," etc. Again, on page 588, he says: "The distinction between a demand for money under the police power and one under the power to tax, is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation, the other for revenue. If, therefore, the purpose is evident, there can be no difficulty in classifying the case and referring it to its proper power." The same distinction was recognized in re Goddard, 16. Pick. 504, 509.

The ordinance of May 3, 1855, passed in pursuance of the authority vested in councils by the act of April 16, 1838, and February 2, 1854, provides that the footways of all public streets and highways . . . shall be graded, curbed, and paved, and kept in repair at the expense of the owners of the ground fronting thereon." The third section of same ordinance provides that the owner shall have the right to do the work of paving and curbing and keeping in repair said footways, and, on his failure to do so, the city shall do it at its expense, and may file a lien for the amount. This requirement is clearly not for the purpose of revenue. It is simply a regulation under the police power of the municipality. On principle, as well as on the authority of our own and other cases, the amount expended by the city in enforcing the regulation is not in any proper sense of the word a tax. It is a liability incurred for neglect to perform a duty imposed by the police power of the city. In so holding, we adhere to the principle ruled in Wilkinsburg Borough v. Home for Aged Women, supra.

Judgment affirmed.

McCHESNEY ET AL. V. VILLAGE OF HYDE PARK.

Supreme Court of Illinois. October, 1894.
151 Illinois, 634.

Mr. Justice BAKER delivered the opinion of the court:

On March 27, 1888, a petition was filed by the village of Hyde Park in the County Court of Cook County, in a special assessment proceeding. The assessment was based upon an ordinance of the Village of Hyde Park, passed on November 7, 1887, for the cost of constructing a certain sewer, and erecting pumping works for drainage purposes. After the coming in of the assessment roll, A. B. McChesney *et al.* filed objections to the confirmation of the assessments as to their respective lands. Upon a hearing, A. B. McChesney *et al.* failed to sustain their objections, and a judgment of confirmation was entered. Thereupon said A. B. McChesney et al. appealed to this court, and filed here a transcript of the record.

On July 13, 1889, another petition was filed by said village in said county court, in another assessment proceeding. The assessment in said latter proceeding was based on another and different ordinance, an ordinance passed by the village on May 24, 1889, for an assessment to be made for the maintenance and operation of the aforesaid pumping works and drainage system. Upon the filing of the assessment roll in this latter proceeding, said A. B. McChesney *et al.* filed objections to the confirmation of the assessment as to their respective lands. They also failed to sustain their objections in this latter proceeding, and the court rendered a judgment of confirmation. A. B. McChesney *et al.* then took an appeal from this latter judgment, and a transcript of the record in this latter proceeding was thereupon filed in this court.

A third transcript of record was also filed in this court, containing a bill of exceptions, from which it appears that, by agreement and stipulation of parties, the two cases mentioned above were tried together, and further appears that by agreement of parties the exceptions taken in both cases might be shown in both cases in one bill of exceptions, as the cases were tried together by consent.

The two cases were submitted to this court as one case; and an opinion filed which affirmed both judgments. Thereafter, upon petition of appellants, a rehearing was ordered.

In respect to the first case, which was predicated upon the ordinance of November 7, 1887, we re-adopt and adhere to what was said in the opinion filed prior to the rehearing.

* * * * * * * * * *

In the second case, in which the village of Hyde Park filed its petition in the County Court on July 13, 1889, the proceedings were based upon an ordinance passed on May 24, 1889. That ordinance provides, that an assessment be made for the maintenance and operation of the drainage system and pumping works of the district, etc.; that the expense and cost of said maintenance and operation shall be defrayed wholly by a special assessment to be made in accordance with sections 18 to 51 inclusive of article 9 of the act to provide for the incorporation of cities and villages; and that certain persons designated therein be and are "appointed commissioners to make an estimate of the cost of the said maintenance and operation contemplated by this ordinance, including labor, materials and all other expenses attending the same," etc. . . .

Under this state of facts the question is raised whether a city or village can pass a lawful or valid ordinance for a special assessment for the operation of or for defraying the running expenses of a drainage system, and pumping works connected therewith, after they have been constructed?

It is admitted, and manifest even if not admitted, that the only authority or power which the village of Hyde Park could claim for passing the ordinance of May 24, 1889, is through the act of the general assembly, approved June 22, 1885, and found in the laws of 1885, on page 60. And, to go back one step further, and to the source of power, the only authority the general assembly had to enact said act of 1885 is found in amended section 31, of article 4, of the constitution of the state, adopted by the people at an election held November 5, 1878.

. . . .

. . . We do not think that the legislature intended by the act of June 22, 1885, to give to the corporate authorities of cities and villages any powers other than those it was authorized to vest in such corporate authorities.

. . . .

The cost of construction and of maintaining or keeping in repair are the only costs that can be levied upon the property benefited by special assessment. The word "operate" does not mean the same thing as either the word "construct," the word "maintain," or the expression "keep in repair," and is not included in the significations of either. Webster defines the word "operate" as meaning "to put into, or to continue in operation or activity," "to work, or to operate a machine." The correct solution is, that the cost of operating, when completed, or paying the running expenses when the ditch, pumping

works and machinery are in activity, devolved upon the village of Hyde Park as a part of its general and corporate current expenses as an incorporated village; the drainage district, as a district, being in the meanwhile liable to pay all expenses that come within the category of maintenance or keeping in repair, as herein defined.

The operating expenses being a legitimate current expense of the municipality of the village, and an indebtedness incurred for corporate purposes, must be paid by it, or since its annexation to the city of Chicago, by said city. . . .

Our conclusion is that the ordinance of May 24, 1889, is invalid, both because it is not authorized by amended section 31 of article 4 of the constitution, and because, even if it was not unconstitutional, no power to pass it was given by the act of the general assembly, approved June 22, 1885; and that consequently all proceedings under it were unauthorized and void.

. . . .

It follows from what we have said . . . that the judgment of said court confirming the assessment made upon appellant's property in the second proceeding, which was based upon the ordinance of May 24, 1889, is reversed. . . .

WILKIN, C. J., dissenting. I do not think pumping works in connection with a drainage system under the act of June, 1885, can be operated by general taxation.

McCHESNEY V. CITY OF CHICAGO.

Supreme Court of Illinois. February, 1898.
171 Illinois, 253.

Mr. Justice WILKIN delivered the opinion of the court:

The city of Chicago filed its petition in the county court of Cook county for the levy and confirmation of a specific assessment, under article 9 of the City and Village Act, for the laying of a cement sidewalk on Rhodes avenue. A roll was duly made and returned. At the time set for hearing the appellant appeared and filed certain objections, all of which, save one, were overruled at the hearing. An objection to the effect that the assessment was greater than the benefits was sustained, and the assessment roll modified and confirmed.

One of the objections overruled, was that the ordinance authorizing the improvement did not specify the nature, character, locality and

description of the proposed improvement, and this is assigned for error. . . . This objection should have been sustained.

Another objection is, that the improvement was unnecessary. It is claimed that the appellant had a plank sidewalk in front of his lots, which was up to grade and in good repair. The question of the necessity of a local improvement is committed by the law to the city council, and the courts have no right to interfere, except in a case where it clearly appears that such discretion has been abused. The ground on which the courts interfere is, that the ordinance is so unreasonable as to render it void. Under the proofs that was not the case here.

For the error in not sustaining the objection with reference to the uncertainty of the location of the improvement the judgment of the county court must be reversed.

Judgment reversed.

IV. Regularity of Proceedings.

MERRITT ET AL. V. CITY OF KEWANEE.

Supreme Court of Illinois. October, 1898.
175 Illinois, 537.

Mr. Justice Magruder delivered the opinion of the court:

The present proceeding is brought under the act of June 14, 1897, "concerning local improvements."

. . . .

Section 7 provides, that all ordinances for local improvements to be paid for wholly or in part by special assessment or special taxation shall originate with the board of local improvements.

. . . .

Section 9 provides that with any such ordinance, presented by such board to the city council, there shall also be presented a recommendation of such improvement by the said board, signed by at least a majority of the members thereof.

. . . .

One of the objections, made by the appellants in the court below, was that the ordinance No. 10 was invalid upon the alleged ground that the owners of a majority of the contiguous property did not petition for said improvement, and that no petition signed by the owners of a majority of said property was ever presented to the board

of local improvements before the passage of said ordinance; and that no local ordinance was passed or adopted by the city council of the city of Kewanee authorizing said assessment.

. . . .

By the terms of section 9, the recommendation made by the board of local improvements is made *prima facie* evidence, that all the preliminary requirements of the law have been complied with. Hence, in the present case, when the petition and the recommendation and the ordinance were introduced in evidence, the city made a *prima facie* case, and the burden of proof was upon the objectors to show, if such was the fact, that the petition had not been signed as required by the act. Section 9 says that, "if a variance be shown on the proceedings in court, it shall not affect the validity of the proceedings unless the court shall deem the same wilful or substantial." It is difficult to understand just what is meant here by the word, "wilful." It seems impossible to believe, that the men, who signed their own names as owners to this petition, did not know that they themselves were not the owners, but that their wives were the owners of the property for which they signed. Their act in so signing would seem to have been, in a certain sense, wilful, if not fraudulent. But, whether this is so or not, we think the proof here made shows that there was a "substantial" variance between the requirements of the law and the mode of signing the petition. Where the law requires that owners shall sign the petition, and parties who are not owners sign the petition, there certainly is a substantial variance between the law and the act done. It sufficiently appears from the testimony of these signers themselves, that their wives were the owners of the property; and, while some of the proof introduced to establish ownership may not have been competent for that purpose, there was other proof that was competent. The word, "owner," as here used in the statute, means owner in fee. (*Illinois Mutual Ins. Co.* v. *Marseilles Manf. Co.,* 1 Gilm. 236; *Wright* v. *Bennett,* 3 Scam. 258; *Whiteside* v. *Divers,* 4 id. 336; *Jarrot* v. *Vaughn,* 2 Gilm. 132.) Although the ordinance was *prima facie* valid in view of the recommendation made by the board of improvements, yet, when the proof showed that the petition had not been signed by the owners of a majority of the abutting property, the void character of the ordinance was established. It is well said that an act, which is void at the time it is done, cannot be ratified. Even the legislature cannot impart life to a void proceeding. *Mechem on Agency,* sec. 114; *Day* v. *McAllister,* 15 Gray, 433; 1 *Am. & Eng. Ency. of Law,* p. 430; *McDaniel* v. *Correll,* 19 Ill. 226; *Miller* v. *City of Amsterdam, supra; Marshall* v. *Silliman,* 61

Ill. 218. Unless a valid ordinance is shown there is nothing upon which the subsequent assessment proceeding can rest. Such a valid ordinance is the foundation of an improvement by special assessment or special taxation, and cannot be dispensed with. (*City of Carlyle* v. *County of Clinton,* 140 Ill. 512; *Lindsay* v. *City of Chicago,* 115 id. 120; *City of East St. Louis* v. *Albrecht,* 150 id. 510.) In proceedings for the collection of taxes or special assessments or special taxes, the requirements of the statute must be strictly followed. (*McChesney* v. *People,* 148 Ill. 221; *City of Alton* v. *Middleton's Heirs,* 158 id. 442.)

We are of the opinion that the county court erred in not sustaining the objection that the petition for the improvement in this case was not signed by the owners of a majority of the property in any one or more contiguous blocks abutting on the street proposed to be paved.

For the error in refusing to sustain the objection the judgment of confirmation entered by the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

WHITEFORD TOWNSHIP V. PROBATE JUDGE.

Supreme Court of Michigan. January, 1884.
53 Michigan, 130.

SHERWOOD, J. The certiorari in this case brings before us proceedings had before the judge of probate for the county of Monroe, appointing a special drain commissioner to construct a certain ditch, and widen, deepen and straighten natural water channels as parts thereof, for the purpose of draining Ottawa lake and certain lands lying along said ditch or drain—said drain being partly in Monroe and partly in Lenawee county.

. . . .

The petition upon which the writ in this case was allowed, states that said Robertson, who was a resident of the county of Lenawee, presented the petition to the judge of probate of Monroe county for the appointment of himself as such special commissioner, and that no notice was given to any one by said Robertson, or the judge of probate, of the pending of the petition, or of the time

and place when a hearing would be had upon the same, and that without any proof or verification of the petition the judge proceeded ex parte and made the order appointing said Robertson such special drain commissioner; and that no notice whatever of any proceedings in the matter was given to parties interested, or any other order made in the premises; and that all the persons owning land through which it was proposed to construct said drain had not released the right of way nor their damages therefor, and that among them were several minors; that the said Robertson has pretended to act under the said appointment, and filed a report of his doings with the county clerk, by which it appears he has ascertained and determined the cost of said drain, established by him as above stated, to be $32,361.05 and that the petitioners had been assessed that amount; that said drain, as laid and established, is for the most part if not entirely, on the line of existing drains already established by the township and county drain commissioners. . . .

The petitioners in the writ make the following objections to the proceedings of the judge of probate and said special drain commissioner, viz.: *First,* because no notice was given to the parties interested of the time and place of hearing of said application for the appointment of said Robertson.

Second, because there was no evidence before said court that the applicants were freeholders of said counties of Monroe and Lenawee, nor was said application verified by the oath of any person.

Third, that the said order of said court did not require said Robertson, in any manner, to qualify as such officer, nor did said Robertson accept such appointment and qualify as such officer, as required by law.

Fourth, because, without having filed any oath or bond, as required by law, and without giving any notice of his contemplated action to determine the necessity and practicability of the proposed drain, he proceeded to act as such commissioner, and to attempt to establish said drain.

Fifth, because all persons owning lands on the line of said proposed drain have not released the right of way over their said lands, nor their claims for damage on account thereof.

Sixth, because the said Robertson, as special drain commissioner, acting under said pretended appointment, has not determined that the proposed drain was necessary and practicable. Nor have any special commissioners been appointed and acted to ascertain the necessity of such drain, and the taking of private property for the purpose thereof, and the just compensation therefor.

We think these objections were all well taken. The proceedings are all statutory, not according to the course of the common law, and must strictly conform to the statutes authorizing them. Every material requirement of the statute must be observed, and the proceedings must show affirmatively on their face a substantial compliance with the law. . . .

. . . .

The application of the judge of probate does not show that the persons who signed the petition presented were resident freeholders of either Lenawee or Monroe counties, and was therefore insufficient; that fact should appear on the face of the petition. This it is which is to put the officer in motion, and it is the basis of his authority to enter upon the course of proceedings to establish a water course or locate a ditch.

. . . .

No notice was given to the parties interested of the pendency of the application or proceedings before the judge of probate, or of the time and place when the same would be heard. Such a notice is always necessary when it is sought to deprive the citizen of his property; and if the notice is not expressly provided for in the law itself, it is in all such cases necessarily implied, and the failure to give such notice rendered the proceedings, if otherwise regular, null and void.

The record shows no proper adjudication or determination by any person of the necessity to make the ditch or drain proposed or whether the same was practicable. This is one of the first things to be considered and ascertained in the proceedings to be taken, and without a compliance with this requirement no further proceedings can be taken legally.

It is unnecessary to consider the proceedings further. They are clearly without the authority of law, and cannot be sustained.

. . . .

We have said more than was necessary to dispose of the questions involved in this case, but we have done so with a view that a better understanding may be had, both of the statute and the decision of this Court already made thereunder.

The proceedings in the case must be quashed, and the petitioners will recover their costs against the respondents.

PARTRIDGE V. LUCAS.

Supreme Court of California. September, 1893.
99 California, 519.

De Haven, J. This is an action to recover upon a street assessment. In the superior court a demurrer to the complaint was sustained, and judgment thereupon rendered for defendant. Plaintiffs appeal.

1. It is well settled that "the passage and publication of the resolution of intention are acts by which the board acquires jurisdiction; and by those acts they acquire jurisdiction to make only such improvements as they described in the resolution, and they cannot, therefore, lawfully cause work other than that which is described to be performed." (*Beaudry* v. *Valdez,* 32 Cal. 276; *Himmelman* v. *Satterlee,* 50 Cal. 68.) The complaint alleges that the board of trustees of the town of San Rafael passed a resolution declaring it to be the intention of such board to order "that B Street . . . be macadamized"; and thereafter, assuming to act under such resolution of intention, awarded to plaintiffs a contract to macadamize the street mentioned, and also to construct therein rock gutterways, "formed by laying flat stones even on their upper surfaces . . . and not more than nine inches square . . . the stone to be hand laid . . . and securely spawled where openings between the joists occur," the interstices to be filled "with clean, hard rock, finely broken and screened."

It is plain that the work described in the resolution of intention did not include the construction of rock gutterways in the street to be macadamized, and therefore the board of trustees did not, under the rule above stated, acquire jurisdiction to contract for such gutterways, and the contract as to these is void. The word "macadamize" has a fixed and definite meaning and refers, not only to the kind of material to be used in covering a street or road, but also to the manner is which it is to be laid. It means to cover a street or road "by the process introduced by Macadam, which consists of small stones of a uniform size, consolidated and leveled by heavy rollers." (13 Am. & Eng. Enc. of Law, p. 1194.) The construction of rock gutterways in the manner described in the contract awarded to plaintiffs is something entirely different from the ordinary work of macadamizing the surface of a street as thus defined; and, unless expressly named and called for in a contract, the contractor under-

taking simply to macadamize a street would not be required to construct such gutterways in order to complete his contract; and, although it may be true that in many instances such gutterways would be of great benefit to streets paved with macadam, still this fact would not render their construction in such streets any the less a distinct improvement, and one not to be deemed as included in a resolution of intention or a contract to macadamize a street unless particularly named in such resolution or contract. A resolution of intention to macadamize a street gives no notice of an intention to construct gutterways therein of any different material than macadam, or to be laid in any different manner, or at a greater cost per foot than the other portions of the street between the curbing.

. . . .

The case of *McNamara* v. *Estes,* 22 Iowa, 246, also cited by plaintiff, is more nearly in point, and yet does not decide the exact question we are now considering. In that case it was decided that under a general power to macadamize streets, a town might also construct gutterways, and we presume although it is not so stated, rock gutterways. The court in effect there held that the power to construct such gutterways was fairly embraced in the general power to macadamize, and was incident thereto. The question before us, however, arises under a statute which, while it confers power upon cities and towns to macadamize streets and construct rock gutterways therein, also requires the passage and publication of a resolution of intention describing the work intended to be done, as a condition precedent to the right to enter into a contract therefor. The object of this statute is to give notice to owners of property who would be affected by the contemplated improvement, in order that they may be heard in opposition thereto if they desire (*Emery* v. *San Francisco Gas Co.* 28 Cal. 375); and, while it is not necessary that the resolution of intention should be as full and minute as specifications contained in a contract, still such resolution must contain a general description of all that is intended to be done; and as rock gutterways are not necessarily any part of the work of macadamizing a street, and are capable of being easily described as a separate and distinct part of the improvement of a street when their construction is deemed necessary or proper in connection with the macadamization of a street, they must be mentioned in the resolution of intention in order to justify a contract for their construction. The rule which requires the board of trustees or city council to keep strictly within the resolution of intention is not a harsh one, and a contractor ought certainly have no difficulty in determining whether the work specified in his contract

falls within the general description of that named in the resolution of intention, and which resolution under the statute is the first and necessary step to be taken by the town or city in obtaining jurisdiction to let any contract for the improvement of a street to be paid for by an assessment upon abutting property.

. . . .

FITZGERALD, J., and MCFARLAND, J., concurred.

CHAPTER XV.

ENFORCING OFFICIAL DUTY.

Cases in this collection illustrative of the use of the mandamus to enforce official duty are: People v. Campbell, 93 N. Y. 196, to cancel record of taxes on land claimed to be exempt from taxation; People v. Salomon, 46 Ill. 333, to force obedience to orders of board of equalization; People v. Supervisors, 51 N. Y. 401, the audit of a claim for repayment of taxes illegally demanded; State v. New Orleans, 37 La. Ann. 16, the levy of a tax to pay a claim; State v. Township Committee, 7 Vroom. (N. J. L.) 66, the issue of bonds by a local corporation; State v. Williston, 20 Wis. 240, delivery of tax deed. See also Rees v. Watertown, 19 Wallace (U. S.), 107.

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CHAPER XVI.

THE REMEDIES FOR WRONGFUL ACTION IN TAX PROCEEDINGS.

I. Refunding Taxes.

CARY V. CURTIS.

Supreme Court of the United States. January, 1845.
3 Howard, 236.

This case came up from the Circuit Court of the United States for the southern district of New York, on a certificate of division between the judges thereof.

The action was brought in the Circuit Court to recover money paid to Curtis, as collector of the port of New York, for duties. . . . .

Mr. Justice Daniel delivered the opinion of the court.

In order to arrive at the answer which should be given to the question certified upon this record, the objects first to be sought for are the intention and meaning of Congress in the enactment of the 2d section of the act of March 3d, 1839, under which the question sent here has been raised. The positive language of the statute, it is true, must control every other rule of interpretation, yet even this may be understood by recurrence to the known public practice as to matters *pari materia,* and by the rules of law as previously expounded by the courts, and as applied to and as having influenced that practice. The law as laid down by this court with respect to collectors of the revenue, in the case of Elliott v. Swartwout, 10 Peters 137, and again incidentally in the case of Bend v. Hoyt, 13 Peters, 263, is precisely that which is applicable to agents in private transactions between man and man, viz.: that a voluntary payment to an agent without notice of objection will not subject the agent who shall have paid over to his principal; but that payment with notice, or with a protest against the legality of the demand, may create a liability on the part of the agent who shall pay over to his principal in spite of such notice or protest. Such was the law as announced from this court, and Congress must be presumed to have been cognizant of its existence; and as the peculiar power ordained by the Constitution

to prescribe rules of right and of action for all officers as well as others falling within the legitimate scope of federal legislation, they must be supposed to have been equally cognizant of the effects and tendencies of this court's decisions upon the collection of the public revenue. With this knowledge necessarily presumed for them, Congress enact the 2d section of the act of 1839.

. . . .

And now let us look at the language of the act of 1839, c. 82, § 2. "That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the treasurer, kept and disposed of; and it shall not be held by said collector or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid; but whenever it shall be shown to the satisfaction of the secretary of the Treasury, that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector or to the person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant on the treasurer in favor of the person or persons entitled to the over-payment, directing the said treasurer to refund the same out of any money in the Treasury not otherwise appropriated."

What is the plain and obvious import of this provision, taking it independently and as a whole? It is that all moneys thereafter paid to any collector for unascertained duties, or duties paid under protest, (i. e. with notice of objection by the payer) shall, notwithstanding such notice, be placed to the credit of the treasurer, kept and disposed of as all other money paid for duties is required by law to be kept and disposed of; that is, they shall be paid over by the collector, received by the treasurer, and disbursed by him in conformity with appropriations by law, precisely as if no notice or protest had been given or made; and shall not be retained by the collector (and consequently not withdrawn from the uses of the government) to await any ascertainment of duties, or the result of any litigation relative to the rate or amount of duties, in any case in which money is so paid.

This section of the act of Congress, considered independently and as apart from the facts and circumstances which are known to have

preceded it, and may fairly be supposed to have induced its enactment, must be understood as leaving with the collector no lien upon, or discretion over, the sums received by him on account of the duties described therein; but as converting him into the mere bearer of those sums to the Treasury of the United States, through the presiding officer of which department they were to be disposed of in conformity with the law. Looking then to the immediate operation of this section upon the conclusions either directly announced or as implied in the decision of Elliott v. Swartwout, how are those conclusions affected by it? They must be influenced by consequences like the following: That whereas by the decision above mentioned it is assumed that by notice to the collector, or by protest against payment, a personal liability for the duties actually paid, attaches upon, and that for his protection a correspondent right of retainer is created on his part; it is thereby made known (i. e. by the statute) that under no circumstances in future should the revenue be retained in the hands of the collector; that he should in no instance be regarded by those making payments to him as having a lien upon it, because he is announced to be the mere instrument or vehicle to convey the duties paid into his hands into the Treasury; that it is the secretary of the Treasury alone in whom the rights of the government and of the claimant are to be tested; and that whoever shall pay to a collector any money for duties, must do so subject to the consequences herein declared. Such, from the 3d day of March, 1839, was the public law of the United States; it operated as notice to every one; it applied of course to every citizen as well as to officers concerned in the regulation of the revenue; and as it removed the implications on which the decision in Elliott v. Swartwout materially rested, that case cannot correctly control a question arising under a different state of the law, and under a condition of the parties also essentially different.

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It is contended, however, that the language and the purposes of Congress, if really what we hold them to be declared in the statute of 1839, cannot be sustained, because they would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. The supremacy of the Constitution over all officers and authorities, both of the federal and state governments, and the sanctity of the rights guaranteed by it, none will question. These are *concessa* on all sides. The objection above referred to admits of the most satisfactory refutation. This may be found in the following position, familiar in this and most other

governments, viz.: that the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as a means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions. Secondly, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and with investing them with jurisdiction either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper to the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.

In devising a system for imposing and collecting the public revenue, it was competent for Congress to designate the officer of the government in whom the rights of that government should be represented in any conflict which might arise, and to prescribe the manner of trial. It is not imagined that by so doing, Congress is justly chargeable with usurpation, or that the citizen is thereby deprived of his rights. There is nothing arbitrary in such arrangements; they are general in their character; are the result of principles inherent in the government; are defined and promulgated as the public law.

A more striking example of the powers exerted by the government, in relation to its fiscal concerns, than is seen in the act of 1839, is the power of distress and sale, authorized by the act of Congress of May 15, 1820, (3 Story, 1791) upon adjustments of accounts by the first comptroller of the Treasury. This very strong and summary proceeding has now been in practice for nearly a quarter of a century, without its regularity having been questioned, so far as is known to the court. The courts of the United States can take cognizance only of subjects assigned to them expressly or by necessary implication; *a fortiori,* they can take no cognizance of matters that by law are either denied to them or expressly referred *ad aliud examen.*

But whilst it has been deemed proper, in examining the question referred to by the Circuit Court, to clear it of embarrassments with which, from its supposed connection with the Constitution, it is thought to be environed, this court feel satisfied that such embarrassments exist in imagination only and not in reality; that the case and the question now before them present no interference with the Constitution in any one of its provisions, and may be, and should be disposed of on the plainest principles of common right.

. . . .

We have thus stated, and will here recapitulate, the principles upon which the action for money had and received may be maintained. They are these: 1st. Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund. 2dly. In the case of an agent, where such agent is not notoriously the mere carrier or instrument for transferring the fund, but has the power of retaining, and before he has paid over has received notice of the plaintiff's claim, and a warning not to part with the fund. 3dly. Where there exists a privity between the plaintiff and the defendant. Let the case before us be brought to the test of these rules. The 2d section of the act of Congress declares, first, that from its passage, all money paid to any collector of the customs for unascertained duties, or duties paid under protest against the rate or amount of the duties charged, shall be placed to the credit of the treasurer, to be kept and applied as all other money paid for duties required by law. Secondly, that they shall not be held by the collector to await any ascertainment of duties, or the result of any litigation, concerning the rate or amount of duty legally chargeable or collectable. And thirdly, that in all cases of dispute as to the rate of duties, application shall be made to the secretary of the Treasury, who shall direct the repayment of any money improperly charged. This section, as a part of the

public law, must be taken as notice to all revenue officers, and to all importers and others dealing with those officers in the line of their duty. There is nothing obscure or equivocal in this law. It declares to every one subject to the payment of duties, the disposition which shall be made of all payments in future to collectors; tells them those officers shall have no discretion over money received by them, and especially that they shall never retain it to await the result of any contest concerning the right to it; and that *quoad* this money the statute has converted those officers into mere instruments for its transfer to the Treasury. With full knowledge thus imparted by the law, can it be correctly understood that the party making payment can, *ex equo et bono,* recover against the officer for acting in literal conformity with the law, converting thereby the performance of his duty into an offence; or that upon principles of equity and good conscience, an obligation and a promise to refund shall be implied against the express mandate of the law? Such a presumption appears to us to be subversive of every rule of right. The more correct inference seems to be, that payment under such circumstances must, *ex equo et bono,* nay, *ex necessitate,* and in spite of objection made at the time, be taken as made in conformity with the mandate of the law and the duty of the officer, which exclude not only any implied promise of repayment by the officer, but would render void an express promise by him, founded upon violation of both the law and his duty. The claimant had his option to refuse payment, the retention of the goods for the adjustment of duties, being an incident of probable occurrence, to avoid this it could not be permitted to effect the abrogation of a public law, or a system of public policy essentially connected with the general action of the government. The claimant, moreover, was not without other means of redress, had he chosen to adopt them. He might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due. The legitimate inquiry before the court is not whether all right of action had been taken away from the party, and the court responds to no such inquiry. The question presented for decision, and the only question decided, is whether, under the notice given by the statute of 1839, payments made in spite of that notice, though with a protest against their supposed illegality, can constitute a ground for that implied obligation to refund, and for that promise inferred by the law from such obligation which are inseparable from, and indeed are the only foundation of, a right of recovery in this particular

form of action. And here is presented the answer to the assertion, that by the act of 1839, or by the construction given to it by this court, the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer. Neither have Congress nor this court furnished the slightest ground for the above assertion.

. . . .

We deem it unnecessary to examine farther the grounds stated in the second and third heads of inquiry, as forming the foundation of the action for money had and received; or to bring to a particular comparison with those grounds the law and the facts of this case, as presented upon the record. The illustrations given under the first head embrace all that is important under the remaining divisions, with respect to the nature of the demand and the position of the parties. Those illustrations establish, in the view of the court, that, so far is the defendant from being obliged, by the ties of natural equity and justice, to refund to the plaintiff the money received for duties, that, on the contrary, under that notice of the law, which all must be presumed to possess, the payment must be understood as having been made with knowledge of the parties that the right of retaining or of refunding the money did not exist in the defendant; that the money by law must pass from him immediately upon its receipt; that payment to him was in legal effect payment into the Treasury; that notice to him was, under such circumstances, of no effect to bind him to refund; that as the collector, since the statute, had power neither to retain nor refund, there could, as between him and the plaintiff, arise no privity nor implication, on which to found the promise raised by the law, only where an obligation to undertake or promise exists; and that, therefore, the action for money had and received could not, in this case, be maintained, but was barred by the act of Congress of 1839.

Mr. Justice Story.

I regret exceedingly being compelled by a sense of duty to express openly my dissent from the opinion of a majority of the court in this case.

DE LIMA V. BIDWELL.

Supreme Court of the United States. October, 1900.
182 United States, 1.

This was an action originally instituted in the Supreme Court of the State of New York by the firm of D. A. De Lima & Co. against the collector of the port of New York, to recover back duties alleged to have been illegally exacted and paid under protest, upon certain importations of sugar from San Juan in the island of Porto Rico, during the autumn of 1899, and subsequent to the cession of the island to the United States.

Upon the petition of the collector, and pursuant to Rev. Stat. sec. 643, the case was removed by certiorari to the Circuit Court of the United States, in which the defendant appeared and demurred to the complaint upon the ground that it did not state a cause of action, and also that the court had no jurisdiction of the case. The demurrer was sustained upon both grounds, and the action dismissed. Hence this writ of error.

. . . .

Brown, J., delivered the opinion of the Court.

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws.

1. . . . By Rev. Stat. sec. 2931, it was enacted that the decision of the collector "as to the rate and amount of duties" to be paid upon imported merchandise should be final and conclusive, unless the owner or agent entered a protest, and within thirty days appealed therefrom to the Secretary of the Treasury; and, further, that the decision of the Secretary should be final and conclusive, unless suit were brought within ninety days after the decision of the Secretary. By Rev. Stat. sec. 3011, any person having made payment under such protest was given the right to bring an action at law and recover back any excess of duties so paid.

The law stood in this condition until June 10, 1890, when an act known as the Customs Administrative Act was passed, 26 Stat. 131, c. 407, by which the above sections Rev. Stat. secs. 2931, 3011, were repealed and new regulations established, by which an appeal was given from the decision of the collector "as to the rate and amount of the duties chargeable upon imported merchandise," if such duties were paid under protest, to a Board of General Appraisers, whose decision should be final and conclusive (sec. 14) "as to the construc-

tion of the law and the facts respecting the classification of such merchandise and the rate of duties imposed thereon under such classification," unless within thirty days one of the parties applied to the Circuit Court of the United States for a review of the questions of law and fact involved in such decision. Sec. 15. It was further provided that the decision of such court should be final, unless the court were of the opinion that the question involved was of such importance as to require a review by this court, which was given power to affirm, modify or reverse the decision of the Circuit Court.

The effect of the Customs Administrative Act was considered by this court in *In re Fassett, Petitioner,* 142 U. S. 479, in which we held that the decision of the collector that a yacht was an imported article might be reviewed upon a libel for possession filed by the owner, notwithstanding the Customs Administrative Act. It was held that the review of the decision of the Board of General Appraisers, provided for by section fifteen of that act, was limited to decisions of the Board "as to the construction of the law and the facts respecting the classification" of imported merchandise "and the rate of duties imposed thereon under such classification," and that it did not bring up for review the question whether an article be imported merchandise or not, nor, under section fifteen, is the ascertainment of that fact such a decision as is provided for. Said Mr. Justice Blatchford: "Nor can the court of review pass upon any question which the collector had not original authority to determine. The collector has no authority to make any determination regarding any article which is not imported merchandise; and if the vessel in question here is not imported merchandise, the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the libel in the District Court, on which the rights of the libellant depend."

"Under the Customs Administrative Act, the libellant, in order to have the benefit of the proceedings thereunder, must concede that the vessel is imported merchandise, which is the very question put in contention under the libel, and must make entry of her as imported merchandise, with an invoice and consular certificate to that effect." It was held that the libel was properly filed.

The question involved in this case is not whether the sugars were importable articles under the tariff laws, but whether, coming as they did from a port alleged to be domestic, they were imported from a foreign country—in other words, whether they were *imported* at all as that word is defined in *Woodruff* v. *Parham,* 8 Wall. 123, 132. We think the decision in the *Fassett* case is conclusive to the effect that,

if the question be whether the sugars were imported or not, such question could not be raised before the Board of General Appraisers; and that whether they were imported merchandise for the reasons given in the *Fassett* case that a vessel is not an importable article, or because the merchandise was not brought from a foreign country, is immaterial. In either case the article is not *imported.*

Conceding then that section 3011 has been repealed, and that no remedy exists under the Customs Administrative Act, does it follow that no action whatever will lie? If there be an admitted wrong, the courts will look far to supply an adequate remedy. If an action lay at common law the repeal of sections 2931 and 3011, regulating the proceedings in customs cases, (that is, turning upon the classification of merchandise,) to make way for another proceeding before the Board of General Appraisers in the same class of cases, did not destroy any right of action that might have existed as to other than customs cases; and the fact that by section 25 no collector shall be liable "for or on account of any rulings or decisions as to the classification of such merchandise or the duties charged thereon, or the collection of any dues, charges or duties on or on account of any such merchandise," or any other matter which the importer might have brought before the Board of General Appraisers, does not restrict the right which the owner of the merchandise might have against the collector in cases not falling within the Customs Administrative Act. If the position of the government be correct, the plaintiff would be remediless; and if a collector should seize and hold for duties goods brought from New Orleans, or any other concededly domestic port, to New York, there would be no method of testing his right to make such seizure. It is hardly possible that the owner could be placed in this position. But we are not without authority on this point.

The case of *Elliott* v. *Swartwout,* 10 Pet. 137, 154, was an action of assumpsit against the collector of the Port of New York to recover certain duties upon goods alleged to have been improperly classified. It was held that as the payment was purely voluntary, by a mutual mistake of law, no action would lie to recover them back, although it would have been different if they had been paid under protest. Said Mr. Justice Thompson: "Here, then, is the true decision: when the money is paid voluntarily and by mistake to the agent, and he has paid it over to his principal, he cannot be made personally responsible; but if, before paying it over, he is apprised of the mistake, and required not to pay it over, he is personally liable." If the payment of the money be accompanied by a notice to the collector that the duties charged are too high, and that the person paying in-

tends to sue to recover back the amount erroneously paid, it was held the such action must lie "unless the broad proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the Government for redress." The case recognized the fact that, with respect to money paid under a mistake of law, the collector stood in the position of an ordinary agent and could be made personally liable in case the money were paid under protest.

This decision was made in 1836. Apparently in consequence of it an act was passed in 1839 requiring moneys collected for duties to be deposited to the credit of the Treasurer of the United States; and it was made the duty of the Secretary of the Treasury to draw his warrant upon the Treasurer in case he found more money had been paid to the collector than the law required. It was held by a majority of this court in *Cary* v. *Curtis,* 3 How. 236, that this act precluded an action of assumpsit for money had and received against the collector for duties received by him, and that the act of 1839 furnished the sole remedy. It was said of that case in *Arnson* v. *Murphy,* 109 U. S. 238, 240: "Congress, being in session at the time the decision was announced, passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839. 5 Stat. 349, 727. This act of 1845 was in force, as was decided in *Barney* v. *Watson,* 92 U. S. 449, until repealed by implication by the act of June 30, 1864," c. 171, 13 Stat. 202, 214, carried into the Revised Statutes as sections 2931 and 3011. In the same case of *Arnson* v. *Murphy,* 109 U. S. 238, it was decided that the common law right of action against the collector to recover back duties illegally collected was taken away by statute, and a remedy given, based upon these sections, which was exclusive. The decision in *Elliot* v. *Swartwout* was recognized, but so far as respected *customs cases* (i. e. classification cases) was held to be superseded by the statutes. So in *Schoenfeld* v. *Hendricks,* 152 U. S. 691, it was held that an action could not be maintained against the collector, either at common law or under the statutes, to recover duties alleged to have been exacted, in 1892, upon an importation of merchandise, the remedy given through the Board of General Appraisers being exclusive.

The criticism to be made upon the applicability of these cases is, that they dealt only with *imported* merchandise and with duties col-

lected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he had seized a ship or its equipment, or any other article not comprehended within the scope of the tariff laws. Had the sugars involved in this case been admittedly imported, that is, brought into New York from a confessedly foreign country, and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the Customs Administrative Act, since it would have turned upon a question of classification.

The fact that the collector may have deposited the money in the Treasury is no bar to a judgment against him, since Rev. Stat. sec. 989 provides that, in case of a recovery of any money exacted by him and paid into the Treasury, if the court certifies that there was probable cause for the act done, no execution shall issue against him, but the amount of the judgment shall be paid out of the proper appropriation from the Treasury.

We are not impressed by the argument that, if the plaintiffs insisted that these sugars were not imported merchandise, they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that, to prevent the seizure of the sugars, plaintiffs did enter them as imported merchandise; but any admission derivable from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course. The collector lost nothing, since he was apprised of the course they would probably take. It is true that in the *Fassett Case,* 142 U. S. 479, the proceeding was by libel for possession of the vessel, which is analogous to an action of replevin at common law; but it would appear that Rev. Stat. sec. 934 would stand in the way of such a remedy here, since by that section "all property taken or detained by any officer or other person under authority of any revenue law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." If the words "under authority of any revenue law" are to be construed as if they read "under color of any revenue law," it would seem that these sugars could not be made the subject of a replevin; but even conceding that replevin would lie, we consider it merely a choice of remedies, and that the plaintiffs were at liberty to waive the tort and proceed in assumpsit.

We are all of the opinion that this action was properly brought.

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WRIGHT V. BLAKESLEE.

Supreme Court of the United States. October, 1879.
101 United States, 175.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an action brought by B. Huntington Wright, the plaintiff in error, against Blakeslee, the defendant, formerly collector of internal revenue for the twenty-first revenue district of New York, to recover the amount of a succession tax collected from the plaintiff and his sister in 1867, the latter having assigned her interest to the plaintiff.

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The assessment or tax, with the penalty, was placed upon the assessment roll, and delivered to the collector (the defendant) for collection, and he notified the parties to pay the tax.

On the 31st of July, 1867, the parties paid the tax under protest, the tax paid amounting to $595.59, of which $389.56 was tax, $194.78 was penalty, and $11.25 was the expenses for making the assessment and valuation. The amount assessed upon each, viz. B. Huntington Wright and Henrietta H. Wright, was $297.29.

On the 5th of October, 1872, the Commissioner of Internal Revenue wrote the parties that the claim to have the tax refunded had not been submitted to the department, and forwarded them a blank to be filled up and transmitted to the department, and they would then pass upon the case upon its merits.

About the 3d of January, 1873, the appeal was perfected and filed with the commissioner.

On the 3d of July, 1873, the commissioner rendered his decision upon the merits, rejecting the whole claim, and gave notice thereof.

On the 15th of June, 1875, Henrietta D. Wright, one of the parties against whom one-half of the tax had been levied and collected, transferred her claim to the plaintiff.

On the same day a summons was delivered to the sheriff of New York to serve on defendant.

On the 24th of June, 1875, the summons was actually served on defendant. The action was originally brought in the State court, but was removed into the Circuit Court of the United States, upon proceedings had under the statute.

Upon these facts the court decided, as matter of law, that the tax and penalty were properly assessed and collected, and that the plaintiff ought not to recover.

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There is, therefore, no doubt of the plaintiff's right to recover the amount of this penalty, if, when paid, the protest against its exaction was sufficient.

On this point it is to be observed that the case stands on a different ground from that of the illegal exaction of duties on imports. To recover these, the statute makes it necessary that the party interested should give notice in writing to the collector, if dissatisfied with his decision, setting forth distinctly and specifically the grounds of his objection thereto. Act of June 30, 1864, sect. 14; 13 Stat. 214; Rev. Stat., sect. 2931; *Westray* v. *United States,* 18 Wall. 322; *Barney, Collector,* v. *Watson et al,* 92 U. S. 449; *Davies* v. *Arthur,* 96 id. 148. No such written notice or protest is required of a party paying illegal taxes under the internal revenue laws. He must pay under protest in some form, it is true, or his payment will be deemed voluntary. *City of Philadelphia* v. *The Collector,* 5 Wall. 720; *The Collector* v. *Hubbard,* 12 id. 1. But whilst a written protest would in all cases be most convenient, there is no statutory requirement that the protest shall be in writing. In the present case, the court merely finds that the payment of the tax and penalty was made under protest, which may have been either written or verbal. We think that this finding is sufficient to show that the payment was not voluntary. It is apparent from the findings, it is true, that the objection of the parties was particularly made against the legality of the tax, and not against the penalty as distinct therefrom. But, of course, the objection included the penalty as well as the tax; and as the latter was clearly illegal, we think that the plaintiff should have had judgment for the amount thereof, unless barred by the Statute of Limitations.

We think that the defence of the Statute of Limitations cannot be maintained. Under the nineteenth section of the act of July 13, 1866 (14 Stat. 152), no suit could be maintained for the recovery of a tax illegally collected until appeal should have been duly made to the Commissioner of Internal Revenue, and his decision had thereon. The act contained other provisions not material to this case. In July, 1867, when the tax was paid, there was no statutory limitation of time for presenting claims for remission of taxes to the Commissioner of Internal Revenue.

On the 6th of June, 1872, an act was passed, by the forty-fourth section of which it was provided that all suits for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, should be brought within two years next after the cause of action accrued, and not after; and all claims for refunding any internal tax

or penalty should be presented to the commissioner within two years next after the cause of action accrued, and not after: *Provided,* that actions for claims which had accrued prior to the passage of the act should be commenced in the courts or presented to the commissioner within one year from the date of such passage: *And provided further,* that where a claim should be pending before the commissioner, the claimant might bring his action within one year after such decision, and not after. 17 Stat. 257. When this act was passed, the claim in the present case had not been formally presented to the commissioner, and so did not come within the last proviso; but, for the purpose of presentation to the commissioner, it was embraced in the first proviso. The parties, therefore, had by the act one year to present their claim to the commissioner; and it was thus presented on the third day of January, 1873, within the time allowed for that purpose.

The commissioner rendered his decision on the third day of July, 1873, and then, for the first time, the parties had a right to bring suit against the collector. Then their cause of action first accrued against him. It is manifest, therefore, that the cause of action against the collector was not embraced within either the first or the second proviso of the section just cited; and that it stood upon the primary enactment of that section requiring that suit should be brought within two years next after the cause of action accrued. This would give the plaintiff until the 3d of July, 1875, to bring his action.

Thus the matter stood when the Revised Statutes went into effect on the 22nd of June, 1874, and there is nothing in them to change the plaintiff's right. The forty-fourth section of the act of 1872 is substantially re-enacted in sect. 3227 of the Revised Statutes, which contains no modifications of phraseology that affect the present case. And as it appears from the findings of the court that this suit was commenced by delivery of the summons to the sheriff on the 15th of June, 1875, it is apparent that the defence of the Statute of Limitations cannot be maintained.

The judgment of the Circuit Court will be reversed, and the case remanded with instructions to enter judgment in favor of the plaintiff for the amount of the penalties exacted from the plaintiff and Henrietta H. Wright, with interest and costs; and it is

So ordered.

DOOLEY V. UNITED STATES.

Supreme Court of the United States. October, 1900.
182 United States 222.

This was an action begun in the Circuit Court, as a Court of Claims, by the firm of Dooley, Smith & Co., engaged in trade and commerce between Porto Rico and New York, to recover back certain duties to the amount of $5374.68, exacted and paid under protest at the port of San Juan, Porto Rico, upon several consignments of merchandise imported into Porto Rico from New York between July 26, 1898, and May 1, 1900.

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A demurrer was interposed upon the ground of want of jurisdiction, and the insufficiency of the complaint. The Circuit Court sustained the demurrer upon the second ground, and dismissed the petition. Hence this writ of error.

Mr. Justice Brown, ... delivered the opinion of the court.

1. The jurisdiction of the court in this case is attacked by the government upon the ground that the Circuit Court, as a Court of Claims, cannot take cognizance of actions for the recovery of duties illegally exacted.

By an act passed March 3, 1887, to provide for the bringing of suits against the government, known as the Tucker act, 24 Stat. 505, c. 359, the Court of Claims was vested with jurisdiction over "first, all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable;" and by section 2 the District and Circuit Courts were given concurrent jurisdiction to a certain amount.

The first section evidently contemplates four distinct classes of cases; (1) those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an Executive Department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words "not sounding in tort" are in terms referable only to the fourth class of cases.

The exception to the jurisdiction is based upon two grounds: First, that the court has no jurisdiction of cases arising under the revenue laws; and, second, that it has no jurisdiction in actions for tort.

In support of the first proposition we are cited to the case of *Nichols* v. *United States*, 7 Wall. 122, in which it was broadly stated that "cases arising under the revenue laws are not within the jurisdiction of the Court of Claims." The action in that case was brought to recover an excess of duties paid upon certain liquors which had leaked out during the voyage, and, being thus lost, were never imported in fact into the United States. Plaintiffs paid the duties, as exacted, but made no protest, and subsequently brought suit in the Court of Claims for the overpayment. The act in force at that time gave the Court of Claims power to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States." The court held, first, that the duties could not be recovered because they were not paid under protest, and, second, that Congress did not intend to confer upon the Court of Claims jurisdiction of cases arising under the revenue laws, inasmuch as, by the act of February 26, 1845, 5 Stat. 727, c. 22, Congress had given a right of action against the collector in favor of persons "who have paid, or shall hereafter pay, money, as and for duties, under protest . . . . . in order to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law," provided that protests were duly made in writing. It was held that this remedy was exclusive, and that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, did not intend to give to the taxpayer and importer a different and further remedy.

Subsequent statutes, however, have so far modified that special remedy that it can no longer be made available, and the broad statement in the *Nichols* case, that revenue cases are not within the cognizance of the Court of Claims, if still true, must be accepted with material qualifications. By the Customs Administrative act of 1890, as we have just held in *DeLima* v. *Bidwell*, an appeal is given from the decision of the collector "as to the rate and amount of the duties chargeable upon imported merchandise," to a board of general appraisers, whose decision shall be final and conclusive "as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duties imposed thereon under such classification," unless application be made for a review to the Circuit Court

of the United States. This remedy is doubtless exclusive as applied to customs cases; but, as we then held, it has no application to actions against the collector for duties exacted upon goods which were not imported at all. Such cases, although arising under the revenue laws, are not within the purview of the Customs Administrative Act; as for such cases there is still a common law right of action against the collector, and we think also by application to the Court of Claims. There would seem to be no doubt about the plaintiffs' remedy against the collector at San Juan.

In the *Nichols* case, it was held that, as there was a remedy by action against the collector, expressly provided by statute, that remedy was exclusive. In *DeLima* v. *Bidwell* we held that although no other remedy was given expressly by statute than that provided by the Customs Administrative Act, there was still a common law remedy against the collector for duties exacted upon goods not imported at all; but it does not therefore follow that this remedy is exclusive, and that the importer may not avail himself of his right of action in the Court of Claims.

But conceding that the *Nichols* case does not stand in the way of a suit in the Court of Claims, the government takes the position that a suit in the United States to recover back duties illegally exacted by a collector of customs is really an action "sounding in tort," although not an action "for damages, liquidated or unliquidated" within the fourth class of cases enumerated in the Tucker act.

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In the cases under consideration the argument is made that the money was tortiously exacted; that the alternative of payment to the collector was a seizure and sale of the merchandise for the non-payment of duties; and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not; whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker act of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the Court of Claims, under the Tucker act, has been repeatedly sustained.

Thus, in *United States* v. *Kaufman,* 96 U. S. 567, a brewer who had been illegally assessed for a special tax upon his business, was held entitled to bring suit in the Court of Claims to recover back the

amount, upon the ground that no special remedy had been provided for the enforcement of the payment, and consequently the general laws which govern the Court of Claims may be resorted to for relief, if any can be found applicable to such a case. This is upon the principle that a liability created by statute without a remedy may be enforced by a common law action. The *Nichols* case was distinguished upon the ground that the statute there had provided a special remedy.

So, too, in *United States* v. *Savings Bank*, 104 U. S. 728, the Court of Claims was held to have jurisdiction of a suit to recover back certain taxes and penalties assessed upon a savings bank.

In *Campbell* v. *United States*, 107 U. S. 407, it was held that a party claiming to be entitled to a drawback of duties upon manufactured articles exported might, when payment thereof has been refused, maintain a suit in the Court of Claims, because the facts raised an implied contract that the United States would refund to the importer the amount he had paid to the government. There was here no question of tort.

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Cases in this collection illustrative of the law relative to the refunding of taxes are: Collector v. Beggs, 17 Wallace (U. S.) 182; Dyer v. Osborne, 11 R. I. 321; Knowlton v. Moore, 178 U. S. 41; Ould v. Richmond, 23 Grattan (Va.) 464; State Tonnage Tax Cases, 12 Wallace 204; Torrey v. Inhabitants, 21 Pickering (Mass.) 64; Tyler v. Inhabitants, 6 Metcalf (Mass.) 470; Veazie Bank v. Fenno, 8 Wallace (U. S.) 533.

II. Remedies Against Assessments.

1. Certiorari.

PEOPLE V. TRUSTEES OF OGDENSBURGH.

Court of Appeals of New York. January, 1872.
48 New York, 391.

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial district, quashing a common law writ of certiorari, which was allowed at a Special Term of the Supreme Court, to rescind an assessment against the relators, as agents of George Parish, a resident of Bohemia, made in 1866. The return of the defendants to the writ shows that their predecessors in office made the assessment complained of, and it contains all the proceedings had before the board of trustees, and their action thereon.

The leading features of the return and other facts appear sufficiently in the opinion.

EARL, C. The charter of the village of Ogdensburgh, as amended by chapter 62 of the Laws of 1865, provides that on or before the first day of May, in each year, it shall be the duty of the trustees to prepare an assessment roll of the property in the said village subject to taxation, with the valuation thereof as set down in the last preceding assessment roll, or as the same may be changed under the authority given in the charter; and to add to such assessment roll any property liable to taxation with the taxable value thereof, which may have come within the corporation since the making of the town assessment roll, or which may have been omitted thereon, and, in their discretion, to reassess any property which, since the making of the town assessment roll, has changed its value. The trustees are clothed with the same power to administer oaths and correct valuations as is given by law to town assessors, and they may employ a special clerk to do the clerical duty and ascertain unassessed property under their direction; and upon the completion of the roll, they are required to cause notice to be published of a time and place to hear objections. At the time and place specified, they are required to meet and hear objections and correct the roll as the facts may require, and the roll, when so corrected, is declared to be final and conclusive.

The facts contained in the return to the writ cannot be disputed, and must be taken as true.

It has been finally settled that a common-law certiorari to review the proceedings of assessors, brings up the merits as well as questions of jurisdiction and regularity, and that where assessors have neither exceeded their powers, nor been irregular in exercising them, the court will still, upon the facts appearing in the return, examine and correct their decisions if erroneous. *People* v. *The Assessors of Albany,* 40 N. Y. 154. I will, therefore, proceed to examine this case upon the merits.

The return shows that the relators were, at the time the assessment was made, the sole general agents of George Parish, a resident of Bohemia, and that as such agents they had possession and control of "all his real and personal property and estate, debts, dues, choses, claims and demands," in said village and within the county of St. Lawrence; that the trustees assessed them as such agents for $50,000 of personal property, and that after hearing their objections at the time and place appointed for that purpose they reduced this sum to $30,000. The relators claimed that the

whole amount should be stricken off from the assessment roll, and the first inquiry is, whether they had $30,000 of taxable property in their possession or under their control. The law makes it the duty of the trustees or assessors, when the property is not upon the town assessment roll, to place a value upon it for the purpose of taxation. They are to search out the property, and place a value upon it, and then place it upon the assessment roll. When they have done this, the roll furnishes *prima facie* evidence that the property is taxable, and its value. After the completion of the roll, they are required to give notice of a time and place to hear objections, and at such time and place they are required to hear proofs and objections, and to make corrections as town assessors are required to.

By section 6 of chapter 176 of Laws of 1851, as amended by chapter 536 of Laws of 1857, it is provided that "whenever any person on his own behalf, or on behalf of those whom he may represent, shall apply to the assessors of any town or ward to reduce the value of his real and personal estate, as set down in the assessment roll, it shall be the duty of such assessors to examine such person under oath, touching the value of his or their said real or personal estate, and after such examination and such supplementary evidence, under oath, as shall be presented by the party aggrieved, they shall fix the value thereof at such sum as they shall deem just; but if such person shall refuse to answer any question as to the value of his real or personal estate, or the amount thereof, or present supplementary evidence under oath to justify a reduction, the said assessors shall not reduce the value of such real or personal estate." By this statute the assessors are not bound by the oath taken before them. They are required to hear the proofs and then to fix the value "at such sum as they may deem just." Where the property is visible, the assessors are supposed to have viewed it. If an oath should be made before them that certain land assessed is worth but $50 per acre, they may still, if they think it worth so much, assess it at $100 per acre; or if an oath should be made that personal property is worth only $1,000, they may still assess it at $3,000. The statute makes them the judges of the value of the property for the purposes of taxation. They are required to exercise their judgment as to its value, notwithstanding any proof that may be produced before them, and the case would have to be a very extraordinary one which would authorize the Supreme Court upon certiorari to review their judgment. Indeed, it would be quite impracticable in most cases for the

Supreme Court upon certiorari to correct the judgment of the assessors as to values, and my attention has been called to no case where it has been done.

If, however, the assessors place upon the assessment roll property not liable to taxation; and they refuse, upon the application of the person aggrieved, to strike it off, then their action can be reviewed by certiorari; as if they assess personal property which has its *situs* in another state (*Hoyt* v. *The Commissioners of Taxes,* 23 N. Y., 224; *People* v. *Gardner,* 51 Barb., 352), or which is exempt from taxation by the laws of the State or of the United States.

The facts returned show that the relators had in their possession, as such agents, a large amount of household furniture and effects in the mansion of their principal in the village, consisting of silver and plated ware, mirrors, books, pictures, wines, cigars and other articles. A list of these articles seems to have been furnished by one of the relators, with the value of each article set down, and the value of the whole, as estimated by him, is $5,896. There is no evidence what value the trustees put upon this property. They were also acting under oath, and they may have valued it at a much larger sum. Suppose they valued it at $10,000 or $15,000; how could the Supreme Court or this court determine that the one or the other party was in error as to the valuation—all the parties really giving their estimate under oath? We are unable to say, therefore, how much of the $30,000 was made up or ought to have been made up of this furniture. It also appears that on the first day of May the relators, as such agents, had $6,000 in money in banks. It matters not that it was subsequently used. It was there when the assessment was made, and was thus liable to be assessed. It may, therefore, be assumed that this $6,000 was part of the $30,000. It also appeared that the relators, as such agents, had in their possession contracts for the sale of land amounting to more than $50,000, less (it is not stated how much less) than $20,000 of which was for land sold in the town in which the village of Ogdensburgh was situated, and hence we may assume that nearly $20,000, on account of these contracts entered into the said sum of $30,000. It does not appear, therefore, that the trustees erred in the *amount* at which they assessed the relators; and the only other question to be considered is, whether this amount was properly assessed to them as the agents of Parish.

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That the furniture in the mansion and the money in the bank

were, under these provisions, properly assessable to the relators is not seriously disputed. And I am unable to see why the money due upon the land contracts must not be assessed in the same way.

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I have, therefore, upon the merits of this case, reached a conclusion adverse to the relators, without examining or passing upon various technical objections raised and discussed by the counsel for the respondents.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

PEOPLE EX REL. WARREN V. CARTER.

Court of Appeals of New York. June, 1888.
109 New York, 576.

Appeal from order of the General Term of the Supreme Court in the third judicial department, made November 15, 1887, which affirmed an order of the special term reducing assessments on the real property of the relators, made in *certiorari* proceedings under chapter 269 of the Laws of 1880. (Reported below, 46 Hun, 444.)

The relators were assessed for the year 1886, in the city of Troy, upon three parcels of land, one parcel known as "River View," containing thirty acres, which was assessed at $60,500; lot 194, on the west side of Third street, on which were two houses numbered 47 and 49, assessed at $29,000, and a third parcel, containing ten acres, which was assessed at $12,000, but which latter assessment is not now in controversy. The relators, within fifteen days after the completion of the assessment-roll and its delivery to the comptroller, procured a writ of *certiorari* to be issued under the act of 1880, directed to the assessors of the city and to the comptroller, upon a petition, alleging, in substance, that the said several assessments were erroneous by reason of over-valuation and inequality.

In support of the allegation of inequality the petition sets forth that the lands of the relator were no more valuable than lands in close proximity thereto, while the assessment thereof was largely in excess of the assessment of such other lands. The allegations of over-valuation or inequality set forth in the petition, and incor-

portated in the writ issued thereunder, were fully denied in the return made to the writ, and the court, on the matter coming before it, appointed a referee to take the proofs, and on the coming in of his report the court decided that the assessment of the "River View" property was erroneous for over valuation in the sum of $20,500, and reduced the amount from $60,500 to $40,000. The court also decided that the assessment of "lot 194 and houses 47 and 49, west side Third street," assessed at $29,000, was unequal "in that it had been made at a higher proportionate valuation than other real property on the same roll in immediate proximity thereto," and that the assessment on lot 194 should be reduced $3,900 to make it proportionately equal to the assessment on the lots immediately adjoining.

There was proof to sustain the finding of over-valuation in respect to the "River View" property. The only evidence to sustain the finding of inequality in the assessment of lot 194 was that the assessment of lot 193, adjoining, was relatively lower than the assessment on lot 194, and the court found that the inequality amounted to the sum of $3,900.

Andrews, J. All real and personal estate in this state not especially exempted is, by law, liable to taxation upon an assessment at its full value. The tax laws proceed upon the theory that all property protected by law should bear its equal burden of taxation, and the statutory system, if exactly administered according to the letter of the statutes, would result in perfect equality of benefit and burden and none would have any just ground of complaint. But no system of taxation has as yet been devised which is capable of complete and perfect administration. The ascertainment and valuation of property liable to taxation is, under our system, committed to a board of assessors. In discharging their functions, mistakes or errors are liable to be committed, which prevent a perfect execution of the system of assessment. It is known that a large amount of personal property escapes taxation either from the negligence of assessors or because its existence cannot be ascertained. So, also, property may be listed which is not liable to assessment, or the assessors, from mistake, inadvertence or misjudgment, may place an erroneous valuation on property, either more or less than its actual value, thereby producing inequality of taxation. The act of 1880 deals with the subject of assessments in respect to illegality, over-valuation, and inequality of valuation, and authorizes a review on *certiorari* at the instance of any person or corporation assessed who claims to have been ag-

grieved by an assessment in either of the respects mentioned. The remedy afforded by the act, where the assessment is illegal or where there is an over-valuation, is simple, practicable and complete. The question whether the assessment complained of is illegal presents purely a question of law on facts appearing on the assessment roll, or which may be readily ascertained by evidence. The question of over-valuation is, in its nature, simple and free from perplexity, and is solved, as is every other fact submitted to the court for determination in case of conflict, by the weight and preponderance of evidence. The clause in the act of 1880, which gives a remedy where the valuation "is unequal, in that the assessment has been made at a higher proportionate valuation than other real and personal property on the same roll by the same officers," presents a question of much greater difficulty. It is claimed on the part of the relators, that, by the true construction of this clause, it is sufficient, to entitle a property owner to a reduction of his assessment, that some other property of the same description, real or personal, is valued on the same roll at a less proportionate value than his own. This being established, it is claimed that the party claiming the benefit of the statute is entitled to a reduction of the valuation of his property to correspond with the valuation affixed by the assessors on the property having such lower proportionate valuation. We concur with Judge PARKER in his dissenting opinion below upon this point. The obvious result of the construction claimed by the relators, if adopted, would be, as is pointed out by Judge PARKER, that every property owner whose property is assessed, could demand that the assessment of his property should be reduced to a valuation proportionate to the lowest valuation of any similar property on the assessment roll, situate anywhere in the town or assessment district, although his own property was not assessed beyond its actual value, and although it was not made to appear that, by reason of the under-valuation of the particular property with which it was compared, the claimant would be compelled to pay more than his due share of the aggregate tax. In the nature of things, it is impossible that all valuations should represent the precise actual value of the property valued. If a particular piece of property on an assessment-roll is under-valued, another may be correspondingly over-valued. Where there is no over-valuation of his own property, it does not follow that the taxpayer will be injured by an under-valuation of some piece of property belonging to another. If all the valuations on the assessment roll, other than that of the party complaining, were proportionately equal, and also proportion-

ately lower than the valuation of his property, injury to the claimant might, perhaps, be a just inference. The mere fact that the claimant can show that his land is assessed proportionately higher than a certain other piece on the same roll does not alone show that he is aggrieved, or that he will be compelled to pay more than his just share of the aggregate tax. By the terms of the act of 1880, it must be made to appear that the party seeking the remedy afforded thereby "is, or will be, injured by the alleged illegal, erroneous or unequal assessment" of which he complains. The adoption of the construction of the act of 1880, contended for by the relator, would greatly embarrass the collection of taxes and lead to burdensome litigation, while at the same time it would award relief in many and probably in most cases where no real right was infringed, nor an actual injury suffered. Those property owners who were alert and prompt to avail themselves of the act, would succeed in shifting a part of the burden of taxation from their own shoulders and casting it upon those less vigilant and active. Where the assessors in a particular case depart from a general rule or ratio of assessment which they have adopted, to the injury of the taxpayer in the particular case, the statute affords a remedy. Without undertaking to define the precise scope of the remedy for disproportionate valuations of property, given by the act of 1880, we think it may be safely said that the petitioner must show a state of facts from which a presumption justly arises that the inequality of which he complains will subject him to the payment of more than his just proportion of the aggregate tax, and that this presumption is not raised by proof that in a particular instance property is assessed at a proportionately lower valuation than his own. Nor does it, we think, make any difference that the assessments compared were of contiguous property. The object of the statute was to afford a remedy to a party injured by unequal valuations, not to enable him, on the mere proof of a mistake or misjudgment of the assessors, as to the relative valuation of his property and that of another, to have his assessment reduced, although his own property was not over-valued, and it does not appear, taking into view the aggregate assessment and valuation of the taxable property on the roll, that he will be compelled to pay more than his just share of the tax.

The conclusion of the court below that there was an over-valuation of the property known as "River View," is supported by evidence, and is not reviewable in this court. (*People ex rel. R. W.*

& O. R. R. Co. v. *Hicks,* 105 N. Y., 198, 200.) The order, so far as it relates to that property, should be affirmed.

That part of the order relating to the assessment on lot No. 194 West Third street should be reversed. The court did not sustain the claim of over-valuation in respect to that lot, but reduced the assessment on the ground of disproportionate valuation as between lot 194 and lot 193. This ground, as we have held, is untenable.

The order of the General Term should be affirmed as to "River View" property, and the order of the Special and General Terms as to the assessment on lot 194 should be reversed.

All concur.

Ordered accordingly.

Other cases in this collection illustrative of the use of the *certiorari* in tax matters are: People v. Barker, 146 N. Y. 304; People v. Coleman, 126 N. Y. 433; People v. Cummissioners, 23 N. Y. 224; People v. Forrest, 96 N. Y. 544; People v. Mayor, 4 N. Y. 419; People v. Smith, 88 N. Y. 576; People v. Sacramento County, 59 Cal. 321; People v. Wemple, 117 N. Y. 136; State v. City of Newark, 3 Dutcher (N. J. L.) 186; State v. Platt, 24 N. J. L. 108; State v. Sickles, 4 Zabriskie (N. J. L.) 125; Whiteford Township v. Probate Judge, 53 Mich. 130; Williamson v. New Jersey, 130 U. S. 189.

II. Statutory Appeal.

THE MANCHESTER MILLS V. CITY OF MANCHESTER.

Superior Court of Judicature of New Hampshire. June, 1876.
57 New Hampshire, 309.

Petition, for abatement of taxes, representing that the assessors of Manchester, in April, 1874, assessed a tax upon the petitioners' property in said city, under the name of the Manchester Print Works and Mills, rating the land and buildings of the corporation at $400,000, and the factories and machinery at $950,000, and assessing a tax upon that valuation.

The petitioners represent that according to the valuation and taxation of other property in said city for this and other years, the valuation of the land and buildings should not have been above $150,000, and of the factories and machinery, $500,000; that on July 25, 1874, they made application to said assessors for an abatement of said tax, which was refused.

At the September term of this court the petition was referred to Aaron W. Sawyer and John S. H. Frink.

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At this term the referees submitted their report.

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The counsel for the city thereupon filed objections to the report and moved that the same be set aside.

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Cushing, C. J. The petitioners represent that at the time of the assessment complained of their land and buildings were valued at $400,000, their factories and machinery at $950,000; and they allege that this valuation, according to the valuation of other property in this and other years, was much too large;—and for this reason they claim an abatement of the tax. It is worth while to note in the beginning what the ground was on which they claim their abatement of taxes. It was not that their property was appraised too high according to its real value, or even high enough, but that it was appraised too high according to the valuation of other property. The city of Manchester does not appear to have made in the outset any objection to the lawfulness or justness of this claim. The record does not show that it was objected on the part of the city that this property ought to be valued at its exact market value, while all the other property in Manchester was valued at a much less rate; but at the time when the commission was issued it was apparently conceded that if this property was really valued at a much higher rate than other property for the purpose of taxation, it would be just that it should be abated.

Nor is it easy to see how the city could contend that this claim of the petitioners was not just, assuming that the facts on which it rested were true; and I think it would be difficult so to contend. I believe it is admitted to be just and lawful that each person should bear the burden of taxation equally with all others. In order to produce this result, it is necessary that all property should be valued proportionally; and if for any reason, whether to prevent the city from being rated too high by the legislature in fixing the share of state and county taxes which each town and city is required to pay, or for any other reason, the authorities had valued all other property at less than its true value, the petitioners' property for purposes of taxation ought to be valued at the same rate.

The law requires that the circuit court shall make such order on this petition as is just. I think we ought to hold as law, that, whenever it shall be made to appear that the property in any town or city has been designedly appraised at less than its true value, the question to be determined is, whether the property on which

the petitioners claim an abatement of tax has been over-valued according to that rate.

If it were true, that, because the law requires that all property should be appraised for the purposes of taxation at its fair cash value, the court is bound to presume that this has been done, and is therefore estopped from inquiring into anything but the actual value of the property in question, then the petition ought to have been dismissed instead of being sent to a commission, because it requires of the court what the court, according to that view of the law, cannot lawfully grant.

The petition, however, was neither dismissed nor amended; and we are therefore to understand that when the commission issued it was then understood by all the parties that if the allegations in the petitions were true it would be just that the tax should be abated.

The committee having reported, the defendants move to set aside the report, on the ground that evidence was admitted which ought not to have been; and we learn from the report that this evidence related to the value of other real estate, excepting manufacturing establishments, situated in various parts of the city of Manchester; and this is the first question of law presented. Is the court to reject this whole report, or any part of it, because such evidence was admitted? The objection in this form is not that the committee have reported facts which they ought not to have reported, but that they have admitted evidence which they ought not to have admitted; and evidence of such a character as that having been received, there would be danger that it would improperly influence the minds of the committee, and so make their report worthless in regard to the matters which they were required to investigate.

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Would the inquiry into the value of real estate in different parts of the city, whether similar or not to the land and buildings of the petitioners, exercise such a disturbing influence on the minds of the committee as to destroy the value of the report as to those matters which they were directed to report upon? I cannot see that it would. The petition makes two classes of property—land and buildings, and factories and machinery. I suppose a factory is a building, but I understand from the petition there are other buildings and land, whether used for boarding-houses or storage or cultivation, which are different from factories, and perhaps subject to different considerations. I am quite unable to see, as matter of law, that the land and buildings of the petitioners are not similar to the other lands and buildings examined by the committee; but I am

quite ready to believe, as a matter of fact, when the committee say, as I understand they do substantially, that they have inquired into the value of similar real estate, that this is true, and that the committee justly instituted comparisons between the appraisal of the land and buildings of the petitioners and other lands and buildings in different parts of the city, even if it were true that some of the "lands and buildings" examined were not exactly like the "land and buildings" of the petitioners. I can therefore find nothing, as matter of law, to complain of in this proceeding; and I think it would be useful for the circuit court, in determining the matter of fact which it has before it, to consider and weigh this part of the report.

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It appears to me that the matters on which the committee were directed to report do not cover the whole ground. The allegation in the petition is, that the property of the petitioners is appraised too high, according to the valuation of other property. The petition does not say, as it appears from the printed case, that the appraisal is too high according to the valuation of other similar property, but it is too high according to the valuation of other property.

On what possible ground could a board of assessors be justified in taxing the property of manufacturing corporations, and appraising it at seven tenths of its true value, and real estate at one half of its true value? I hold that, as matter of law, the court, in order to do what justice requires, ought to ascertain the value of this property according to the valuation of other property. If it be true that some property is intentionally appraised at seven tenths of its true value, and other property at one half of its real value, and still other property at a different rate, the property of these petitioners ought to be appraised at what would be a fair average rate.

If it turns out, on examination, that there is a settled usage in regard to this matter, and that the assessors of the city of Manchester deliberately, and as a rule, appraise property at less than its true value, then, as matter of law, I hold that this property ought to be appraised in the same way; and if it be true that by accident or mistake or erroneous judgments the property of these petitioners has been appraised at a higher rate than other property, then I think that, as matter of law, it is just that the tax should be reduced. Whether the report furnishes to the circuit court all the needed information, is not matter of law, but matter of fact, to be determined by that court.

. . . .

The circuit court is the trier of the facts. If on the evidence already furnished it finds itself desiring further information, it can say so, and either recommit the case, or perhaps hear evidence itself. But in the end the question should be, whether the property of the petitioners is rated too high according to the valuation of other property.

Motion denied.

See also Supervisors v. C., B. & Q. R. R. Co., 44 Ill. 229, *supra.*

PASSAVANT V. UNITED STATES.

Supreme Court of the United States. October, 1892.
148 United States, 214.

Mr. Justice JACKSON delivered the opinion of the court.

The principal question presented by the record in this case is whether, under the Customs Administrative act of June 10, 1890, 26 Stat. c. 407, p. 131, the Circuit Courts of the United States have any jurisdiction to entertain an appeal by importers from a decision of the board of general appraisers, as to the *dutiable value* of imported merchandise; in other words, whether the Circuit Courts of the United States have, under the provisions of said act, any authority or jurisdiction, on the application of dissatisfied importers, to review and reverse a decision of a board of general appraisers, ascertaining and fixing the *dutiable value* of imported goods, when such board has acted in pursuance of law, and without fraud, or other misconduct, from which bad faith could be implied.

The material facts of the case on which this question arises are the following: In November, 1890, and July, 1891, the appellants, Passavant & Co., imported into New York from France gloves of different classes or grades, which were entered by the importers at certain valuations. The collector of the port of New York, under the authority conferred by section 10 of said administrative act, caused the imported goods to be appraised, and upon such appraisal their value was advanced or increased by the appraiser to an amount exceeding by more than 10 per cent the value thereof as declared by the importers upon entry. The importers being dissatisfied with this advanced valuation, a reappraisement was made by one of the general appraisers and on further objection by the importers to this valuation, the matter was sent to the board of general apprais-

ers, under and in accordance with the provisions of section 13 of the Customs Administrative Act. This board after due notice, and examination of the question submitted, sustained the increased valuation of the merchandise. Thereupon the collector of the port levied and assessed upon the imported goods a duty of fifty per cent *ad valorem,* that being the rate of duty on the gloves under paragraph 458 of the tariff act of October 1, 1890, and in addition thereto a further sum equal to two (2) per cent of the total appraised value for each 1 per cent that such appraised value exceeded the value declared in the entry, under and by virtue of section 7 of said act of June 10, 1890.

. . . .

The importers duly served upon the collector a protest against his appraisement of duty for any and all excess above 50 per cent *ad valorem,* and upon any greater value than the declared or entered value, for the alleged reasons that no legal reappraisement had been made; that the board of appraisers had declined to receive or entertain evidence offered by them as to the true market value of the merchandise; that the board had determined matters upon estimates or values furnished by agents of the Treasury; that evidence of persons who were not experts, and had no personal knowledge of the value of gloves in the markets of France, had been taken and acted on; that the importers were given no opportunity to controvert evidence against them; that the original invoice was correct; that the duties should not be assessed upon any greater amount, and that the action of the board was in all respects illegal. The collector duly transmitted this protest, with the papers in the case, to the board of general appraisers, who adhered to the increased valuation, affirmed the action of the collector, and held that the decision of the board as to such valuation was final and conclusive under section 13 of said act of June 10, 1890, and could not be impeached or reviewed upon protest. Thereupon and within due time the importers filed their application in the United States Circuit Court for the Southern District of New York for a review of the case, and a reversal of the decision of the board of appraisers and the action of the collector in assessing the duties on the basis of the increased valuation placed upon the imported merchandise, and in imposing the additional duty as provided by said section 7, above referred to.

. . . .

Upon the record as thus presented the Assistant United States Attorney moved the court to dismiss the application or appeal for

want of jurisdiction to entertain the same. The motion was sustained, and the Circuit Court thereupon certified to this court, under the fifth section of the act of March 3, 1891, 26 Stat. c. 517, pp. 826, 827, the question whether said court had any jurisdiction to enter upon, hear and decide the issues sought to be raised by the allegations of the petition, which are specially set out in the certificate, but need not be here enumerated, as they are embraced in the general claims or propositions, hereinafter stated, which are relied on by appellants before this court.

. . . .

The certificate and the appeal, therefore, present substantially the same question, and need not, for that reason, be separately considered. It is not claimed or alleged in either the protests made by the importers as to the appraisement of the merchandise, or in their application to the Circuit Court to review and reverse the decision of the board of general appraisers, that there was any wrongful or erroneous *classification* of the gloves, or improper *rate* of duty levied thereon under the tariff act of October 1, 1890; but the substantial complaint is that the *dutiable value* of the imported goods was not greater than the value mentioned in the invoice and declared in the entry, and that the advanced appraisement was, therefore, erroneous, and also that the merchandise was not liable for any additional or penal duty such as the collector levied and imposed thereon under section 7 of the act of June 10, 1890, by reason of the advanced or increased valuation placed upon the same by the appraisers.

Can a complaint of this character be entertained and considered by the Circuit Courts of the United States in a case like the present, where the board of general appraisers has, upon the appeal of the importers, ascertained and decided that the imported article actually possesses a value greater than that stated in the invoice or entry? Can the decision of the board on the question of the dutiable value of the merchandise be reviewed by the courts under the provisions of section 15 of the Customs Administrative Act? This is the real question presented, and we are clearly of the opinion that no such jurisdiction is conferred by this statute or any other provision of law. It is provided by section 15 of the act "that if the owner, importer, consignee or agent of any imported merchandise, or the collector or the Secretary of the Treasury, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section 14 of this act, as to the construction of the law and the facts respecting the classification, they or either of them

may, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision."

It was said by Mr. Justice Blatchford, speaking for the court in *In re Fassett,* 142 U. S. 479, 487, that "the appeal provided for in section 15 [of said act] brings up for review in court only the decision of the board of general appraisers as to the construction of the law, and the facts respecting the classification of imported merchandise and the rate of duty imposed thereon under such classification. It does not bring up for review the question of whether an article is imported merchandise or not, nor under § 15 is the ascertainment of that fact such a decision as is provided for. The decisions of the collector from which appeals are provided for by § 14 are only decisions as to 'the rate and amount' of duties charged upon imported merchandise, and decisions as to the dutiable costs and charges and decisions as to fees and exactions of whatever character."

The appeal to the court in the present case seeks to review no such decisions as are thus enumerated as falling within its jurisdiction under said sections. On the contrary, the decision of the board of general appraisers sought to be reviewed and corrected by this application to the court relates to the reappraisement of the imported goods. By section 13 of the act the decision of the board on that matter is declared to "be final and conclusive as to the dutiable value of such merchandise against all parties interested therein." On such valuation the collector, or the person acting as such, is required to ascertain, fix and liquidate the rate and amount of duties to be paid on such merchandise and the dutiable costs and charges thereon according to law.

It was certainly competent for Congress to create this board of general appraisers, called "legislative referees" in an early case in this court, (*Rankin* v. *Hoyt,* 4 How. 327, 335,) and not only invest them with authority to examine and decide upon the valuation of imported goods, when that question was properly submitted to them, but to declare that their decision "shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein."

In *Hilton et al.* v. *Merritt,* 110 U. S. 97, it was held that the valuation of merchandise made by customs officers, under the statutes, for the purpose of levying duties thereon, was conclusive on the importer, in the absence of fraud on the part of the officers. In

this case several sections of the Revised Statutes of the United States; relating to customs duties, were referred to, among them being section 2930, which prescribed the method of appraising imported merchandise, and provided that "the appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly." Under that provision this court held that the valuation of imported merchandise made by the designated officials or appraisers was, in the absence of fraud on the part of such appraisers, *conclusive* on the importer. The same rule was reasserted in the recent case of *Earnshaw* v. *United States,* 146 U. S. 60, in which it was held that a reappraisement of imported merchandise under the provisions of section 2930, Revised Statutes, when properly conducted, was binding. The earlier decisions of this court cited and referred to in *Hilton* v. *Merritt and Earnshaw* v. *United States,* established the same general rule. The provisions of the Customs Administrative Act of June 10, 1890, as to the finality and conclusiveness of the decision of the board of general appraisers as to the valuation of imported merchandise, when that question was regularly submitted to and examined by them, is expressed in clearer and more emphatic terms than in former statutes. The language is so explicit as to leave no room for construction. In the tariff legislation of the government, congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to the market value of imported articles, without allowing an appeal to the courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the fair dutiable value of imported merchandise, could apply to the courts to have a review of that subject, the prompt and regular collection of the government's revenues would be seriously obstructed and interfered with. The statute authorizes no such proceeding, and the Circuit Court can exercise no such jurisdiction.

The appraised value of the merchandise having been conclusively ascertained in the manner provided by law, and being found to exceed by more than ten per centum the value declared in the entry, the collector, as a matter of mere computation, under the direction and authority of section 7 of said act, properly levied and collected, in addition to the ad valorem duty imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeded the value declared in the entry.

Section 7 of said act is substantially similar to section 8 of the

act of Congress passed on the 30th of July, 1846, 9 Stat. 42, 43, c. 74, which declared that, if the appraised value of imports which have actually been purchased should exceed by ten per centum or more the value declared on the entry, then, in addition to the duties imposed by law on the same, there should be levied, collected and paid a duty of 20 per centum ad valorem on such appraised value. In *Sampson* v. *Peaslee,* 20 How. 571, that provision was sustained and enforced, except as to so much of the additional duty of 20 per centum as was levied upon the *charges* and *commissions.* The court there say that the ruling of the lower court, in confining the additional duty to the *appraised value* of the imports, was the correct interpretation of the section.

As stated by Mr. Justice Campbell, speaking for the court, in *Bartlett* v. *Kane,* 16 How. 263, 274, such additional duties "are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud." They are designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty. It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character. When the dutiable value of the merchandise is fully ascertained and is found to be in excess of the value declared in entry by more than ten per centum this extra duty or penalty attaches, and the collector is directed and required to levy and collect the same in addition to the *ad valorem* duty provided by law.

The importers in this case cannot be heard to complain of this additional duty or penalty, which was a legal incident to the finding of a dutiable value in excess of the entry value to the extent provided by the statute. They had full notice of the proceedings before the board of general appraisers upon their appeal to said board, and ample opportunity to be heard on the question of the market value of the imported goods. It cannot, therefore, be properly said that they have been subjected to penalties without notice or an opportunity to be heard, or been deprived of their property without due process of law.

The judgment of the Circuit Court dismissing the importers' appeal to that court for want of jurisdiction must, therefore, be

Affirmed.

Other cases in this collection offering instances of the use of a statutory method of appeal in tax matters are: Commonwealth v. N. Y., L. E. & W. Ry. Co., 129 Pa. St. 463; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Holt's Appeal, 5 R. I. 603; Matter of McPherson, 104 N. Y. 306; Matter of Swift, 137 N. Y. 77; Plummer v. Coler, 178 U. S. 115; Supervisors v. C., B. & Q. Ry Co., 44 Ill. 229.

STATE V. CENTRAL PACIFIC R. R. CO.

Supreme Court of Nevada. October, 1871.
7 Nevada 99.

By the Court, LEWIS, C. J.:

The state filed a complaint in the usual statutory form, against the defendant for the recovery of a tax due and unpaid for the year 1869. The defendant's answer was demurred to, and the demurrer sustained. A supplemental answer was also filed, and afterwards an amended answer, which was also demurred to, and the demurrer sustained; and upon refusal to amend, judgment was rendered for the state, from which defendant appeals.

The grounds taken by the demurrer are, first, that the facts relied on in the answer are not alleged with sufficient certainty; and, secondly, admitting the pleading to be sufficient in this particular, still the facts do not constitute a defense. The defense pleaded is fraud in the assessment.

. . . .

Here, then is an allegation that the fair or just value of the road, and consequently the value which the law made it the assessor's duty to place upon it, was six thousand dollars per mile. But it is charged that, although he knew this to be its fair value, yet contrary to his official judgment, and with intent to defraud the defendant, he fraudulently and craftily set down and assessed the same at fifteen thousand dollars a mile. Can it be said that such facts do not constitute a fraud against which the law will afford relief? Can it be maintained that if the taxpayer has inadvertently neglected to make a statement as required by the assessor, the latter may disregard every known rule for estimating the value of property for taxation, and impose a valuation upon it which he knows to be exorbitant and unjust? In other words, is the taxpayer under the circumstances completely at the mercy of the assessor? Clearly not. Every man's sense of justice revolts at such a doctrine; nor does the law leave the citizen so utterly without protection. The statute imposes a penalty for a failure or neglect to make out a statement, which is the deprivation of the right to have the assessment made by the assessor equalized by the board constituted for that purpose. Yet, he has still the right to insist that the officer, who in such case makes the assessment, shall discharge his duty honestly, and that he shall not knowingly and fraudulently place an excessive valuation on his property. Notwithstanding the failure

on the part of the taxpayer to return a list when demanded, it is no less the duty of the assessor to be governed by just rules and the fairest motives in making the assessment of his property. Such failure to comply with the demand of the officer does not place the citizen in the place of an outlaw, beyond the reach of law or the protecting arm of a court of justice. To a certain extent, it is true, the statute expressly deprives him of a right—that of obtaining relief before the board of equalization. This, however, is the extent of the penalty for the neglect. This takes from him the right to claim any reduction in the valuation of his property, if the assessment has been honestly made, although it may be exorbitantly overestimated; but does not deprive him of the right to claim relief in a court of justice against an overestimate, fraudulently and purposely placed on the property—he is deprived of all remedy for the errors of the assessor, but not for his fraudulent misconduct. The statute designates a fraud in the assessment as one of the defenses which may be made to an action for taxes. The facts here alleged certainly constitute fraud in the assessment, and consequently the case is brought directly within the statute.

It must be borne in mind that we are simply discussing the sufficiency of a pleading, and not the real facts in this case, and therefore do not wish to be understood as intimating that fraud was really practiced. That is a matter which must be established by the defendant, if it exists at all, at the trial on its merits.

The demurrer is improperly sustained. The order and judgment below must therefore be reversed.

By GARBER, J.: I dissent.

Other cases in this collection upon the power of courts in collateral proceedings to declare an assessment void are Bell v. Pierce, 51 N. Y. 12; Boreland v. Boston, 132 Mass. 89; County Commissioners, etc., v. Union Mining Co., 61 M'd. 547; Felsenthal v. Johnson, 104 Illinois, 21; Hersey v. Board, 37 Wis. 75, and Wygatt v. Washburn, 15 N. Y. 316; Palmer v. McMahon, 133 U. S. 660, *supra.*

III. Equitable Remedies (Injunction).

DOWS V. CITY OF CHICAGO.

Supreme Court of the United States. December, 1870.
11 Wall. 108.

Appeals from decrees of the Circuit Court of the United States for the Northern District of Illinois in two suits; one original, the other a cross suit.

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A demurrer was interposed to the bills, original and cross. The Circuit Court sustained the demurrers to both, and the complainants in the two cases electing to abide by their bills, the court entered decrees dismissing the bills. From these decrees appeals were taken.

. . . .

Mr. Justice Field delivered the opinion of the court.

According to the view we take of this case, it is unnecessary to consider the force of any of the objections urged by the appellants to the decrees rendered. Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

No court of equity, therefore, will allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before

the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived.

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. . . . . our attention has not been called to any well considered case where a court of equity has interfered by injunction after its jurisdiction was questioned, except upon some one of the special circumstances mentioned.

. . . .

The Supreme Court of Illinois is equally clear upon this question. In the case of *Cook County* v. *The Chicago, Burlington, and Quincy Railroad Company,* (35 Ill. 465) the subject was considered, and the court said that it had been unable to find any decision, in its previous adjudications, asserting a right to bring a bill to restrain the collection of a tax illegally assessed, without regard to special circumstances. It concludes an examination of its former decisions by stating, that while it was considered settled that a court of equity would never entertain a bill to restrain the collection of a tax, except in cases where the tax was unauthorized by law, or where it was assessed upon property not subject to taxation, it had never held that jurisdiction would be taken in these excepted cases without special circumstances, showing that the collection of taxes would be likely to produce irreparable injury, or cause a multiplicity of suits.

Upon principle this must be the case. The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action.

We see no ground for the interposition of a court of equity

which would not equally justify such interference in any case of threatened invasion of real or personal property.

The cross-bill filed by the bank presents different features. That institution insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon their shares in its hands, which it is required to do by the law of the State, or if the shares were sold, it would be subjected to a multiplicity of suits by the shareholders, and were it an original bill the jurisdiction of the court might be sustained on that ground. But as a cross-bill it must follow the fate of the original bill.

Decrees affirmed in both suits.

SAGE AND OTHERS, RESPONDENTS, V. THE TOWN OF FIFIELD AND OTHERS, APPELLANTS.

Supreme Court of Wisconsin. January, 1887.
68 Wisconsin 546.

TAYLOR, J. The appellants insist that the circuit court erred in refusing to dissolve the temporary injunction—(1) because the complaint does not state facts which, if admitted to be true, would justify the court in granting the relief prayed for in the complaint, even if it were admitted that the electors of said town had no authority to vote a road tax upon the taxable property of said town exceeding the sum of $2,000; . . . . .

. . . .

Under the law requiring the highway taxes to be collected in money as other taxes are collected, it seems to us very clear that the duty of the supervisors as to making out warrants for the collection of such taxes is clearly abrogated; and if any duty remains on them as a board in fixing the amount of taxes to be raised for that purpose in the town, it is simply their duty in the absence of any vote of the electors on the subject, to declare the number of mills which shall be assessed on the valuation of the property of said town, and then the amount is to be carried out by the clerk upon the general assessment roll, and collected with the other taxes. In the case at bar the electors have indicated that all the highway taxes in said town for the year shall be $5,000. That sum the electors had the power to vote, with or without the approval of the board of supervisors, as the law gives the electors the right to direct

the supervisors to raise fifteen mills on the dollar valuation, provided such fifteen mills does not exceed the sum of $2,000 and seven mills on such valuation. In this case the $5,000 does not exceed such sum; and if it be technically necessary that the board should, after the vote of the electors, direct so many mills on the valuation to be raised as would make the sum of the $5,000 voted by the electors, they could do that by directing that amount to be apportioned upon the assessment roll; and, according to their answer, that was all that was intended to be done in this case.

There is no equity, therefore, in staying the officers of the town in collecting a tax which the law clearly authorizes, even though some of the formalities of the law may not have been complied with. . . . . .

By the Court.—The order of the circuit court is reversed, and the cause is remanded with directions to that court to dissolve the injunction.

SNYDER V. MARKS.

Supreme Court of the United States. October, 1883.
109 United States 189.

This suit was brought in a State court of Louisiana, by the appellant, a tobacco manufacturer, against the appellee, a collector of internal revenue, to obtain an injunction restraining the appellee from seizing and selling the property of the appellant to pay two assessments of taxes against him, made by the commissioner of internal revenue, and to have the assessments declared void. An injunction having been granted *ex parte,* the appellee removed the suit, by *certiorari,* into the Circuit Court of the United States for the District of Louisiana, on the allegation that it was brought on account of acts done by the appellee, as such collector, under the authority of the internal revenue laws of the United States, and to enjoin him, in his official capacity, from enforcing the payment of assessments made against the appellant, under authority of such laws, by executing warrants of distraint, as authorized by such laws.

After the removal of the suit the appellant, under an order to reform his pleading, filed a bill in equity in the circuit court.

. . . .

The appellee demurred to the bill for want of equity, and because

no suit could be maintained in any court to restrain the collection of any tax of the United States, and the appellant could not be permitted in this suit to attack the validity or regularity of the assessments or restrain the execution of a warrant issued thereunder. The circuit court sustained the demurrer and dismissed the bill. To review its decree this appeal is brought.

Mr. Justice BLATCHFORD delivered the opinion of the court. After reciting the facts he stated:

The sole object of this suit is to restrain the collection of a tax which purports to have been assessed under the internal revenue laws. A decree adjudging the tax to be void as against the appellant is sought for only as preliminary to relief by injunction, and would be futile for any purpose of this suit unless followed by an injunction.

The internal revenue act of July 13th, 1866, c. 184, 14 Stat. 152, provided, § 19, as follows: "No suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue according to the provisions of law in that regard, and the regulations of the secretary of the treasury, established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal." By § 10 of the act of March 2d, 1867, c. 169, 14 Stat. 475, it was enacted that § 19 of the said act of 1866 be amended "by adding the following thereto:" "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." In the Revised Statutes this amendment of and addition to § 19 of the act of 1866 is made a section by itself, § 3224, separated from that of which it is an amendment and to which it is an addition, and reads thus: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The word "any" was inserted by the revisers. This enactment in § 3224 has a no more restricted meaning than it had when after the act of 1867, it formed a part of § 19 of the act of 1866, by being added thereto. The first part of § 19 related to a suit to recover back money paid for a "tax alleged to have been erroneously or illegally assessed or collected," and the section, after thus pro-

viding for the circumstances under which a suit might be brought, proceeded, when amended, to say, that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." The addition of 1867 was *in pari materia* with the previous part of the section and related to the same subject-matter. The "tax" spoken of in the first part of the section was called a "tax" *sub modo*, but was characterized as a "tax alleged to have been erroneously or illegally assessed or collected." Hence, when, on the addition to the section, a "tax" was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in § 3224. There is, therefore, no force in the suggestion that § 3224, in speaking of a "tax," means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.

The statute clearly applies to the present suit, and forbids the granting of relief by injunction. It is distinctly alleged in the bill, that the appellee claims that the appellant owes to the United States the amounts assessed for taxes, both the tax assessed against the appellant and that assessed against Irwin & Snyder. The bill also shows sufficiently that the assessment had relation to the business of the appellant as a manufacturer of tobacco, and to his liability to tax, under the internal revenue laws, in respect to such business. The instructions of the internal revenue department in regard to the preparation of assessment lists provided, that where an assessment was reported against a manufacturer of tobacco for having removed any taxable articles from his manufactory without the use of the proper stamp, or for not having duly paid such tax by stamp at the time and in the manner provided by law, the entry in the column headed "article or occupation" should be "Stamp Tax. Tob.," with liberty to use the initials "S. T." as an abbreviation for "stamp tax." The instructions stated that "Tob." is an abbreviation for "tobacco." Resort may be had to these instructions to show the meaning of the abbreviations in the assessment list. Read by the light of the instructions, the list shows a tax which the appellant might be liable to pay, and one which the commissioner had general jurisdiction to assess against him.

The inhibition of § 3224 applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco

manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law. *Howland* v. *Soule;* Deady, 413; *Pullman* v. *Kinsinger,* 2 Abbott U. S. 94; *Robbins* v. *Freeland,* 14 Int. Rev. Rec. 28; *Delaware R. R. Co.* v. *Prettyman,* 17 id. 99; *United States* v. *Black,* 11 Blatchford, 538, 543; *Kissinger* v. *Bean,* 7 Bissell, 60; *United States* v. *Pacific Railroad,* 4 Dillon, 66, 69; *Alkan* v. *Bean,* 23 Int. Rev. Rec. 351; *Kensett* v. *Stivers,* 18 Blatchford, 397. In *Cheatham* v. *United States,* 92 U. S. 85, 88, and again in *State Railroad Tax Cases,* 92 U. S. 575, 613, it was said by this court, that the system prescribed by the United States in regard to both customs duties and internal revenue taxes of stringent measures, not judicial, to collect them, with appeals to specific tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by § 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject matter in question, have made the assignment and claim that it is valid.

The decree of the circuit court is affirmed.

This statute does not prevent an injunction by a stockholder of a corporation to restrain the corporation from paying an illegal or unconstitutional tax. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429.

Other cases in this collection illustrative of the use of the injunction in tax matters are: Belo v. Commissioners, 82 N. C. 415; Brown v. Houston, 114 U. S. 622; City of Newton v. Atchinson, 31 Kan. 151; County Commissioner v. Union Mining Co., 61 M'd., 547; Cypress Pond Draining Co. v. Hooper, 2 Metcalfe (Ky.) 350; Felsenthal v. Johnson, 104 Ill. 21; Gilman v. Sheboygan, 2 Black (U. S.) 510; Hersey v. Board, 37 Wis. 75; Home of the Friendless v. Rouse, 8 Wallace (U. S.) 430; Kirtland v. Hotchkiss, 100 U. S. 491; Lowell v. Boston, 111 Mass. 454; McMillen v. Anderson, 95 U. S. 37; New Orleans v. Stempel, 175 U. S. 309; Pelton v. National Bank, 101 U. S. 143; Rees v. Watertown, 19 Wallace 107; Savings, etc., Society v. Multnomah Co., 169 U. S. 421; Snell v. Fort Dodge, 45 Iowa 564; State Tonnage Tax Cases (second case), 12 Wallace (U. S.) 204; Tappan v. Merchants' National Bank, 19 Wallace 490; Washington Avenue, 69 Pa. St. 352; Youngblood v. Sexton, 32 Mich. 406.

Other cases of equitable relief are Albany Brewing Co. v. Meriden, 48 Conn. 243, and Stater v. Maxwell, 6 Wallace 268, both cases of bills to set aside a lien.

IV. Actions Against Tax Officers.

Cases in this collection illustrative of the actions which may be brought against tax officers are: Brackett v. Vining, 49 Me., 356; Gordon v. Cornes, 47 N. Y. 608; Mygatt v. Washburn, 15 N. Y. 316; Price v. Mott, 52 Pa. St. 315; Shaw v. Peckett, 26 Vt. 482; Sheldon v. Van Buskirk, 2 N. Y. 473; Van Voorhes v. Budd, 39 Barbour (N. Y.) 479.

V. Replevin.

Cases in this collection illustrative of the action of replevin in tax cases are: Carpenter v. Snelling, 97 Mass. 452; and Daniels v. Nelson, 41 Vt. 161.

VI. Habeas Corpus.

Cases in this collection illustrative of the use of the habeas corpus in tax cases are: *Ex parte* City Council of Montgomery, 64 Ala. 463 and Commonwealth v. Byrne, 20 Grattan (Va.) 165.

VII. Action to Recover Possession of Property Sold for Non-Payment of Taxes.

Cases in this collection illustrative of the action to recover property sold for non-payment of taxes are: Bennett v. Hunter, 9 Wallace (U. S.) 326; Bosworth v. Danzien, 25 Cal. 297; Brown v. Hays, 66 Pa. St. 229; Brown v. Veazie, 25 Me. 359; Covington v. Kentucky, 173 U. S. 231; Cruger v. Dougherty, 43 N. Y. 107; Donald v. McKinnon, 17 Fla. 746; King v. Mullins, 171 U. S. 404; Smith v. Messer, 17 N. H. 420; Williams v. Peyton's Lessee, 4 Wheaton, 77; Woodside v. Wilson, 32 Pa. St. 52.

VIII. Prohibition.

Cases of the use of the writ of prohibition in tax matters to be found in this collection are: People v. Board, 59 N. Y. 92, used here to prevent the revocation of a tax license, and Weston v. Charleston, 2 Peters, 449, to restrain levy of an illegal tax.

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